No. 44

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1956**

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UNITED STATES OF AMERICA,
*Appellant,*

*v.*

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), *Appellee*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

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## BRIEF FOR APPELLEE

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HAROLD A. CRANEFIELD,
*8000 East Jefferson Avenue,*
*Detroit 14, Michigan;*
JOSEPH L. RAUH, JR.,
*1631 K Street, N. W.,*
*Washington 6, D. C.*
*Attorneys for Appellee.*

Of Counsel:
JOHN SILARD,
NORMA ZARKY,
KURT HANSLOWE,
REDMOND H. ROCHE, JR.

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### Opinion Below

The opinion of the district court is reported at 138 F. Supp. 53 and may be found at pp. 36-44 of the record.

### Jurisdiction

On February 8, 1956, the District Court for the Eastern District of Michigan entered an order dismissing the indict-

ment on the ground that it did not charge an offense under 18 U.S.C. 610 (R. 45-46). On February 20, 1956, a notice of appeal to this Court was filed in the district court (R. 46-47), and on April 23, 1956, this Court entered an order noting probable jurisdiction (R. 47). 351 U.S. 904. The Government relies on the Criminal Appeals Act (18 U.S.C. 3731) as the basis for the jurisdiction of this Court.[1]

## Questions Presented

1. Whether the Government may, on a direct appeal under the Criminal Appeals Act, urge upon this Court a construction of the indictment different from that adopted by the district court.

2. Whether an indictment interpreted by the district court as charging a labor union with payments for television broadcasts over a commercial television station "to inform its members and others of the position of the Union on those seeking certain federal offices" charges the offense of making an "expenditure" in connection with a federal election within the meaning of 18 U.S.C. 610.

3. Whether, if such an expenditure is prohibited by 18 U.S.C. 610, the statute violates the provisions of the Constitution of the United States in that the statute (i) abridges freedom of speech and of the press and the right peaceably to assemble and to petition; (ii) abridges the right to choose senators and representatives guaranteed by Article I, § 2 and the Seventeenth Amendment; (iii) creates an arbitrary and unlawful classification and discriminates against labor organizations in violation of the Fifth Amendment, and (iv) is vague and indefinite and fails to

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[1] As will be seen (pp. 13-30, *infra*), the Government's effort to alter the district court's construction of the indictment raises questions beyond the jurisdiction of this Court on a direct appeal under the Criminal Appeals Act.

provide a reasonably ascertainable standard of guilt in violation of the Fifth and Sixth Amendments.

## Statutes Involved

The Criminal Appeals Act (18 U.S.C. 3731) provides in relevant part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> • • • • •
>
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> • • • • •
>
> If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.
>
> • • • • •

18 U.S.C. 610 provides:[2]

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution *or expenditure* in connection with any election to any political office, *or in connection with any primary election or political convention or caucus held to select candidates for any political office*, or for any corporation whatever, *or any labor organization* to make a contribution *or expenditure* in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, *or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices*, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.
>
> Every corporation *or labor organization* which makes any contribution *or expenditure* in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, *or officer of any labor organization*, who consents to any contribution or expenditure by the corporation *or labor organization*, as the case may be, * * * in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

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[2] The italicized portions of the statute were added in 1947 as Section 304 of the Taft-Hartley Act. This was the first time that Congress, which had banned corporate contributions as early as 1907, entered the field of expenditures. Congress had subjected labor unions to the ban against corporate contributions as a temporary measure in 1943 as part of the Smith-Connally Act, 57 Stat. 168, 50 U.S.C. 1509 (1940 ed.).

*For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.*

## Statement

On July 20, 1955, appellee union was indicted (R. 2-6) on four counts, each alleging a separate violation of Section 610 of Title 18, which prohibits "contributions" and "expenditures" by labor unions in connection with federal elections. Each count alleges that appellee is a labor organization as defined in Section 610 and that primary (Count I) and general (Counts II, III and IV) elections were held in 1954 in the State of Michigan to select candidates for, and senators and representatives in the Congress of the United States. Each count further alleges that appellee expended a specified sum from its general treasury fund by paying that sum to Luckoff and Wayburn Productions, Detroit, Michigan, to defray the expenses of preparation for and telecasting of political television broadcasts sponsored by appellee over television station WJBR-TV. The indictment sets out that those television broadcasts, "urging and endorsing" the selection or election of certain persons to be candidates for or representatives or senators in the Congress of the United States, "included expressions of political advocacy, and were intended by defendant to influence the electorate generally" and "to affect the results" of the election.

Each count also alleges that the money for the expenditure came from the general fund of the union, consisting of union dues, and that the expenditure was not made from

voluntary political contributions or subscriptions of employee members of the union and was not paid for by advertising or sales.

On July 29, 1955, appellee pleaded not guilty (R. 15) and on October 31, 1955, appellee moved to dismiss the indictment on the following grounds (R. 18-19):

1. The provisions of Section 610 do not prohibit the payments set forth in the indictment.

2. The provisions of Section 610 abridge the freedom of speech and of the press, the right peaceably to assemble and the right of petition, in violation of the rights of appellee and its members under the First Amendment.

3. The provisions of Section 610 unlawfully abridge the right to choose senators and representatives in the Congress guaranteed by Article I, § 2 and the Seventeenth Amendment.

4. The provisions of Section 610 create an arbitrary and unlawful classification and discriminate against labor organizations in violation of the Fifth Amendment.

5. The provisions of Section 610 are arbitrary and capricious and deprive appellee and its members of liberty and property without due process of law in violation of the Fifth Amendment.

6. The statute is vague and indefinite and fails to provide a reasonably ascertainable standard of guilt in violation of the Fifth and Sixth Amendments.

7. The provisions of Section 610 invade the rights of appellee and its members protected by the Ninth and Tenth Amendments.

On February 3, 1956, after having received detailed briefs and reply briefs from both parties and after having heard summary oral argument (R. 20-35), District Judge Picard

rendered his opinion (R. 36-44). He construed the indictment as charging that appellee union paid for television programs "to inform its members and others of the position of the Union on those seeking certain federal offices" (R.43) and, so construed, he held that "under the authorities the 'expenditures' charged in this indictment are not expenditures prohibited by the Act" (R. 44). After a thorough discussion of *United States* v. *CIO*, 335 U.S. 106, Judge Picard concluded, "As is our duty, we try to follow the law as laid down by our Supreme Court and there is no difficulty in doing so here. What the Supreme Court has said is not ambiguous to us" (R. 44).

On February 8, 1956, Judge Picard entered the order dismissing the indictment (R. 45-46).

On February 20, 1956, the Government filed its Notice of Appeal (R. 46-47) and on March 9, 1956, its Statement As to Jurisdiction.

Appellee filed a Motion to Affirm and the Government's opposition thereto included a Motion to Advance the cause for argument and decision at the October, 1955 term "in view of the importance of the question at this time."

On April 23, 1956, this Court noted probable jurisdiction (R. 47) and denied the Government's Motion to Advance.

## Summary of Argument

### I

The district court, with the concurrence of the parties, read the indictment as charging payments by appellee union to a commercial television station "to inform its members and others of the position of the Union on those seeking certain federal offices" (R. 43). Since on this appeal "this Court must accept the construction given to the indictment by the District Court" (*United States* v. *Borden Co.*, 308 U. S. 188, 193), the question presented here is whether the

"expenditure" prohibition of Section 610 applies to union payments for television time expressing the "position of the Union on those seeking federal offices." Nevertheless, the Government argues, despite the interpretation below, that the indictment permits proof of flagrant electioneering and sloganeering by appellee intended to contribute to a campaign for federal office. Actually, if the indictment did permit such proof and did run the gamut from the mere expression of union views to electioneering and sloganeering intended to contribute to a campaign, it would fail for want of material elements of the crime and for vagueness.

The Government, having taken a direct appeal to this Court at a time when it sought an early authoritative decision on the matters in issue, cannot now obtain a review of the hypothetical set of facts it urges upon this Court, nor can it, having appealed to this Court, now bring about a remand to the United States Court of Appeals for the Sixth Circuit by raising questions of interpretation beyond the authority of this Court. Nor should this Court, on its own motion, undertake to remand the case to the Court of Appeals. The interpretation of the indictment which the Government now urges upon this Court was not urged upon the district court and, therefore, could not be considered by the Court of Appeals. In addition, the construction urged by the Government will only result in the invalidation and dismissal of the indictment. The Government having concurred below in the construction of the indictment offered by appellee and having taken a direct appeal to this Court, appellee ought not now be forced into another forum for the consideration of matters of interpretation of the indictment not raised in the district court and, therefore, not properly before any appellate forum.

## II

Payments by a labor union for commercial television broadcasts to inform its members and others of the position

of the union on Congressional candidates cannot be deemed expenditures prohibited by Section 610 in the light of this Court's decision in *United States* v. *CIO*, 335 U.S. 106. The court below could find no distinction in the statute between payments to make possible the expression of the union's views in a union newspaper (as in the *CIO* case) and payments to make possible the expression of the union's views over a commercial television station (as here). Certainly there is no statutory language on which such a distinction could be predicated. Equally clearly, the legislative history offers no ground for any such distinction; indeed the discussion on the floor of the Senate evidenced a concern with the expression of union views through a union newspaper at least as great as with the expression of a union's views through commercial channels. Furthermore, the policy of interpreting the statute in such a way as to avoid constitutional questions applies with at least equal force to the indictment now before the Court. Finally, every practical consideration of American life calls for the rejection of a line which permits communication within the union's own membership but prevents communication between the union and the general community of which it is a part.

The court below was not the first court that could find no legal distinction in the difference between the expression of a union's views in a union newspaper and the expression of its views over a commercial broadcast station. The Court of Appeals for the Second Circuit rejected this distinction back in 1949. *United States* v. *Painters Local Union*, 172 F. 2d 854 (CA 2, 1949). In the years since the *CIO* and *Painters Local* cases, no prosecutions were brought until the one at bar because, in the words of Assistant Attorney General Olney, the Justices of this Court "expressed so many doubts about it [the statute], all of them did, that it made it almost impossible, certainly impractical, to prosecute under it."

## III

If the statute is construed to prohibit a labor organization from making its views known to its members and the public through commercial media of communcation, it abridges the freedom of speech, of the press, of assembly and of petition of appellee and its members in violation of the First Amendment to the Constitution of the United States. Indeed, so construed, Section 610 impairs the rights of appellee and its members under the First Amendment at the very point where those rights are most zealously guarded by the Constitution and the courts in the interest of the fullest participation of all citizens in our democratic government and the continued vigor of the political processes upon which our free government depends.

The Government seeks to defend the statute as necessary to prevent undue influence upon federal elections by labor unions and to protect the dissenting minority of union members. But labor political expenditures run far below its proportionate share based on voting population and true respect for our fundamental democratic process would seem to require that labor union participation in political processes be encouraged rather than restricted. In so far as minority protection is concerned, the principle of majority rule is no less appropriate to decisions having to do with the expenditure of union funds in the political arena than to any other form of union activity. But an even simpler answer to the Government's attempted justification of Section 610 as a protection of the minority is that the statute applies whether or not there is in fact any minority at all. The statute applies even where the expenditures are made by unanimous decision of the union membership; it applies even where, though some members might have a different choice of candidates, all members support the union in implementing the majority decision; it applies in areas

where the union shop does not exist or where membership in the union is unrelated to the union shop; it applies, finally, even where the union allows dissenting members to contract out of the fund supporting the expression of union political views.

IV

Section 610 unlawfully abridges the right of appellee and its members to choose Congressional representatives, guaranteed by Article I, § 2, and the Seventeenth Amendment to the Constitution. This Court has recognized that the constitutional guarantees of the right to vote and to choose Congressional representatives are not empty phrases, but a guarantee of the right of "effective choice" (*United States* v. *Classic*, 313 U.S. 299, 314). The constitutional right of qualified voters to make an "effective choice" of Congressional representatives requires more than mere protection of the mechanics of the casting and counting of ballots; it requires that very group political action which Section 610 prohibits. Congressional power to guard the exercise of the civil rights of voters cannot be converted into Congressional power substantially to destroy or impair them. Yet this is the immediate effect of the statute on the freedom of working men and women to protect their interests through union political action; it deprives union members of their primary organized means for the protection of their interests in many of the most important political decisions of the day.

V

The prohibition of union expenditures in connection with a federal election is an arbitrary discrimination depriving unions and their members of liberty without the due process of law guaranteed by the Fifth Amendment. With the sole exception of the prohibition on labor union election expenditures, Congress has never enjoined associations of individ-

uals formed to promote common interests from expending funds in federal elections. Associations of farmers, doctors and lawyers, of employer, manufacturer and business groups, of veterans, fraternal and community groups, are all left free to spend general funds in federal elections. The statute singles out unions, while all other groups of individuals are left unfettered. By so leaving all other groups unrestricted, Congress has aggravated the existing imbalance in the expenditures of other groups as against the far smaller expenditures by labor unions.

Nor is the discrimination against labor unions offset by the ban on corporate election expenditures. The ban on corporate expenditures is not and cannot be enforced. Furthermore, corporations are state-created entities deriving funds from widespread ownership and business interests; they are not associations of individuals formed to promote common group interests through social, educational, political and other means.

## VI

Section 610 is vague and indefinite and fails to provide a reasonably ascertainable standard of guilt in violation of the Fifth and Sixth Amendments to the Constitution. For this Court to draw a line between a union publication and a commercial means of communication would raise far more questions of interpretation for the union official attempting to comply with the statute than it would settle. If the union is forbidden to use commercial channels of communication, could it distribute its union publication beyond the union membership? Could it put extra copies in conspicuous public places for the public to pick up and carry home? Could it send a copy of its publication to every resident in a particular district by house-to-house distribution? Could it do a dozen other things in this same field? Furthermore, would the interpretation of the statute to prohibit payments for a commercial television broadcast make illegal all payments to make the union's views known to its membership

and the public other than through the publication of a union newspaper? Would it, for example, cover overhead, salaries, and travel in preparing and delivering speeches or issuing news releases? Furthermore, is the time when the expenditures are made in relation to the election significant or determinative? Would the expense of preparing and publishing voting records of individuals just after Congress adjourned violate Section 610? If not, would there be a violation if these voting records were distributed during a campaign? There are hundreds of such questions and no answers in the statute. It is hard to think of a statute which raises more questions for one genuinely trying to comply and whose language provides fewer answers.

VII

We submit appellee need only convince this Court of the seriousness of the constitutional issues to be faced if Section 610 is not given the restrictive interpretation laid down by the precedents to date. The review of the constitutional issues provided hereinafter demonstrates the wisdom of these precedents in restricting the statute and avoiding grave constitutional issues which lie at the very heart of our democratic society.

## Argument

### I

### The Question Before This Court Is the Sufficiency of the Indictment as Construed by the District Court Rather Than the Sufficiency of the Indictment as Interpreted by the Government for the First Time in This Court

#### 1. *Introduction*

It is, of course, elementary that a direct appeal to this Court by the Government from the dismissal of an indict-

ment based on a ruling as to the invalidity or construction of a Federal statute does not open up the whole case. 18 U.S.C. 3731; *United States* v. *Borden Co.*, 308 U.S. 188, 193. The Government may not, in arguing that a statute prohibits the acts pleaded in an indictment, disregard the construction of the indictment by the district court and seek to sustain its validity by construing it more broadly than did the district court. Nevertheless, this is exactly what the Government is attempting in the instant case.

The Government, as we shall show, is arguing here that 18 U.S.C. 610 applies to certain types of union television broadcasts having a specific political content and intent, but disregards the fact that the district court's construction of the indictment gives it a much more limited scope. The Government is thus presenting to this Court a merely hypothetical case—the applicability of the statute to an indictment other than the one at bar. Since it is only the applicability of the statute to the indictment as construed below that is properly presented to this Court on a direct appeal, the construction of the *indictment* by the district court must of necessity delimit the question of its construction of the *statute*. We address ourselves initially, therefore, to the issue of just what facts the district court held the indictment to allege. It is only those facts, not the facts which the Government now seeks to present, which the district court held to be outside the scope of 18 U.S.C. 610.

2. *The District Court's Construction of the Indictment*

The indictment charges appellee with payments for union-sponsored commercial television broadcasts "urging and endorsing" the selection and election of Congressional candidates. The content of the television programs in question is omitted from the indictment.

Appellee read the indictment and so indicated in its briefs in the court below as charging the union with making pay-

ments "to make known to its members and to the public its position on elections of significance to the union and its members" or, put another way, as charging the union with payments to present "its views on candidates to its members and the public through normal channels of communication" (*Brief in Support of Defendant's Motion to Dismiss the Indictment*, p. 27; see also p. 3). In the same vein, appellee introduced its argument as to the constitutionality of Section 610 in its brief below with the statement:

> "Before the Court reaches this difficult constitutional issue involving the statute's effect on First Amendment freedoms, Section 610 must be construed to include the expenditures *described in the indictment*. So construed over defendant's objection . . . the statute prohibits disbursements of money by labor unions for the purpose of disseminating to members and to the public *their views about candidates and elections through public media of information.*" *Brief in support of Defendant's Motion to Dismiss*, p. 28. See also *Reply Brief of Defendant in Support of Motion to Dismiss the Indictment*, pp. 2, 4, 6. (Emphasis added.)

At no time, either in its lengthy briefs in the district court or in the oral hearing before the court, did the Government assert that appellee's construction of the indictment failed to accord with its own construction. On the contrary, the Government based its entire argument in the court below on the view that Congress constitutionally could and did prohibit *all* political broadcasts by labor unions over commercial radio and television stations.[3] There was never any suggestion in the court below that the communication charged in the indictment went beyond the expression of

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[3] *Brief in Opposition to Defendant's Motion to Dismiss the Indictment*, pp. 40-48.

union views or that it was intended as a direct or indirect contribution to the campaign of any particular candidate.[4] The Government was willing in the court below to test the scope and validity of the statute as applied to any and all payments for commercially broadcast endorsements of candidates by a labor union.

Indeed the Government appears to have concurred in appellee's construction of the indictment below. In a lengthy comparison of the indictment herein with that in the *CIO* case, the Government assumed the similarity in content and intent of the communications in the two cases; its distinction of the *CIO* case was predicated entirely upon the difference between a payment for a "house organ" and a payment for a commercial television broadcast to the general public.[5]

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[4] In this latter connection, it should be noted that the indictment does not charge a "contribution," and government counsel, in oral argument in the court below, expressly waived any such contention. The following colloquy appears at page 24 of the record:

> "The Court: . . . Now, your position is that they just merely wanted to make sure that contributions which you do not question,—and neither side claims that this is a contribution within the meaning of the statute, do you?
>
> "Mr. Woods: No."
>
> Mr. Woods is Chief Assistant United States Attorney and represented the Government before Judge Picard.

[5] "The Court in the instant case has before it an entirely different indictment than that in the *CIO* case. No "house organ" is here involved. This is not a charge of spending union funds for publishing or distributing a periodical. It is a charge of making an expenditure for a political broadcast. The instant indictment clearly alleges that the money expended on the telecasts came from the Union's general treasury fund, made up of membership dues, and not from any other source, and avers that no portion of the general treasury fund included any contributions by members specifically earmarked for political purposes; that no subscription of members was involved; that the telecasts were beamed on a commercial television station in which the defendant had no financial interest and were intended by defendant to reach and did reach the general public (as distinguished from reaching its members, as in the *CIO* case). Moreover, while the Court in the *CIO* case held that Congress did not intend to cover a publication such as was involved in the *CIO* case, the legislative history of Section 610 reflects, *infra*, that the limitation on expendi-

Furthermore, the Government conceded below that its indictment put in issue the right of labor unions to express their views publicly on candidates, but argued that this First Amendment restriction was warranted. It sought to justify "a prohibition against expenditures for political purposes [which] *prohibits expression of opinion*" and addressed its arguments to the question whether preventing "the organization from *expressing its own opinions for or against a candidate,*" by prohibiting expenditures therefor, could be squared with the First Amendment (*Brief in Opposition to Defendant's Motion to Dismiss*, p. 40). (Emphasis added.)

Thus it appears to have been the clear understanding of both sides below that the indictment charged the union with no more than payments for commercial television programs to express its view on candidates for federal office; there was no slightest suggestion of the contention now made by the Government that the indictment charged flagrant electioneering or sloganeering or a contribution to any candidate. The district judge at the oral argument indicated a similar view to that of the parties below as to what was charged. He dwelled at length on the question whether newspaper editorials favoring a candidate were included within the prohibitions of the Act and indicated that, in his view, the indictment charged merely public editorializing by a labor union. Thus, the district judge said to counsel for appellee, "it is your position . . . that if it is legal for a newspaper to make those kind of comments, editorially, in a political way, and to stop them [unions] from going on the air or television and doing the same thing, that that is unconstitutional . . . " (R. 28).

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tures for political purposes was intended to apply to the use of radio (and by a parity of reasoning to the then as yet undeveloped television) . . . " *Brief in Opposition to Defendant's Motion to Dismiss the Indictment*, p. 4.

The opinion of the district court adopts this same view of the indictment. The district judge referred to the *CIO* case wherein a labor union had editorialized in favor of a candidate (an activity described by this Court (335 U.S. at 123) as "expressing views on candidates") and held that the "violations charged" in that case were "the same charges as here" (R. 42). The judge went on, accepting all that had been conceded by the parties beforehand, to construe the indictment as charging payments for a broadcast intended to express the views of the union and without reference to flagrant electioneering or sloganeering in the content of the program or an intent by the union to contribute to a candidate. He said:

> "According to the authorities the Union was not making an expenditure on behalf of a political candidate. It desired to inform its members and others of the position of the Union on those seeking certain federal offices. It was exercising the right of free speech. The question then might present itself as to whether or not what the Union did was in fact 'make a contribution.' This might be important if the Union were charged with 'making a contribution.' It is not" (R. 43).[6]

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[6] The Government states in its brief in this Court (p. 16) that the quoted statement "does nothing to narrow the effect of the decision. Any political broadcast under the auspices of a union does, in the words of the district court, state the position of the union. Even spot announcements of the sort already suggested—'Vote for Mr. X, the union's friend'—perform that function." But it is clear that the district court's characterization of the commercial television program as one "to inform its members and others of the position of the Union" and his specific equation of the indictment here with that in the *CIO* case and with that of newspaper editorializing, did narrow the effect of the decision to exclude mere sloganeering. It seems doubtful that repeated spot announcements, "Vote for Mr. X, the union's friend," could ever properly be characterized as a statement "of the position of the Union on those seeking certain federal offices"; but it certainly could not constitute the type of statement of position which the judge construed the indictment to charge. Furthermore, even if repeated sloganeering "Vote for Mr. X,

Further evidence of the district court's construction of the indictment appears from the part of the opinion analogizing the expression of views through newspaper editorials to the charges in the instant case. The court expressly stated that "to interpret this statute otherwise than has been done, is to jeopardize . . . the right of every newspaper to print any political editorial during a campaign in which federal officers are elected, advocating one adversary over another" (R. 43).

Both explicitly and implicitly the district court's opinion construes the indictment as alleging expenditures for the purpose of a public expression of the union's political views. The decision leaves no room for an expansive construction which would permit proof that the content of the broadcast was flagrant electioneering or sloganeering intended as a contribution to a candidate's campaign. The indictment having failed to allege, and the Government having failed to suggest, any ulterior intent or sloganeering content to the broadcast in question, the district court construed the indictment to allege only what it could reasonably be interpreted as charging—that the union made payments for commercial television broadcasts to state its position with respect to candidates for federal office.

### 3. *The District Court's Construction of the Indictment Is Not Subject to Challenge on Direct Appeal*

The district court's construction of the *indictment*, as set out above, is not open to challenge by the Government here,

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the union's friend", could be deemed to be a statement of position, the Government's argument still breaks down, for the district court's holding that the type of statement of position, such as is found in the *CIO* case or in newspaper editorials, was not prohibited by the statute was not a holding that all statements of position, no matter how flagrant the electioneering or what their intent, are outside the prohibitions of the statute. No allegations in the indictment, either on its face or as construed, required the district court to consider such remote possibilities.

for its direct appeal is only from the district court's construction of the *statute*. *United States* v. *Borden Co.*, 308 U. S. 188; *United States* v. *Keitel*, 211 U. S. 370. The only question properly presented on direct appeal is the validity or applicability of the statute to facts alleged in the indictment as construed by the district court. *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 537-8; *United States* v. *Jones*, 345 U. S. 377; *United States* v. *Hastings*, 296 U. S. 188. "This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review." *United States* v. *Borden Co.*, 308 U. S. at 193. On this appeal, therefore, the question presented is whether the "expenditure" prohibition of 18 U.S.C. 610 applies to union payments for television time where the union "desired to inform its members and others of the position of the Union on those seeking certain federal offices."[7]

4. *The Government Asserts Its Right to Prove Matters Excluded by the District Court's Construction of the Indictment*

Despite the rule to the contrary, the Government disputes and disregards the district court's construction of the indictment. Never before having suggested what it now suggests as to the intent and content of the broadcasts in question, the Government states in this Court that "the District Court *failed to note* that the allegations of this indictment would cover the latter [flagrant electioneering and sloganeering] type of broadcast" (*Brief in Opposition*

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[7] All apart from the consideration that the Government is bound by the district court's construction of the indictment on a direct appeal under the Criminal Appeals Act, a serious question arises as to the right of the Government to raise the argument of "flagrant electioneering" and intent to contribute for the first time on appeal. See *United States* v. *Classic*, 313 U.S. 299, 329; n. 16, p. 29, *infra*.

*to Appellee's Motion to Affirm*, p. 3). In its brief on the merits (p. 19) the Government states that "the court below *failed to note* that the specific facts on which the CIO decision rested appeared from the face of the indictment in that case. That decision cannot be automatically applied to this indictment where no equivalent specific facts are alleged. The indictment, as written, must be tested against the statute . . ." (Emphasis added.) Under cover of the words "failed to note", the Government thus summarily disposes of the construction of the indictment by the district court and proceeds to assert that it might have proven various additional matters under the indictment. The Government suggests that the indictment permits proof that the broadcasts in question were nothing but a repetition of a "vote for X" slogan (*Brief*, p. 15)[8] and that the broadcasts were for the *"special purpose"* (*Brief*, p. 23) of *"actively electioneering on behalf of a particular candidate"* (*Brief*, p. 23) or were *"out-and-out"* (*Brief*, p. 15), *"direct"* (*Brief*, p. 18), *"active"* (*Brief*, p. 18) and *"flagrant"* (*Brief in Opposition to Motion to Affirm*, p. 2) *electioneering*, constituting a *"valuable subsidy"* (*Brief*, p. 17) which *"differs but little from a direct contribution"* (*Brief*, p. 17) and is *"almost a direct contribution"* (*Brief*, p. 7.) It is difficult to conceive of a construction departing more radically from an expression of the union's views "to inform" union men and the public of "the position of the union on those seeking federal offices."

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[8] We are somewhat surprised at the Government's action in raising in this Court the issue of repeated sloganeering such as "Vote for Mr. X, the union's friend." The Government did not suggest to the district court, before whom it would be required to make its proof if the case went to trial, that the Union's action had consisted of such sloganeering. Whether it refrained from doing so because it did not want to suggest to the court below more than it could prove, we do not know. At any rate we presume it is clear to this Court that this suggestion by the Government is purely hypothetical and not intended in any way as a description of the broadcasts actually involved in this case.

### 5. *The Government's Present Construction of the Indictment Would Render It Invalid*

The Government does not contend that the indictment specifically alleges flagrant electioneering and sloganeering intended to contribute to a campaign for federal office. It apparently concedes that the minimum proof necessary under the indictment would be no more than the district court's interpretation of the indictment as charging payments for the broadcast of an expression of union views. *Brief*, p. 19. What the Government seems to be saying is that, under the indictment, it may prove either payments for commercially sponsored programs expressing the union's views, by statements such as are found in the *CIO* case or in newspaper editorials, or it may prove flagrant electioneering intended to contribute to a campaign. As will be seen, an indictment construed in any such broad and general way would be invalid for failure to allege material elements of the crime and for vagueness. It is these considerations which would have made impossible the construction of the indictment by the district court which the Government now offers here for the first time.

(i) Admitting the "general nature of . . . allegations" in the indictment (*Brief*, p. 15), the Government states that the indictment "would plainly permit proof" of "active direct electioneering" (*Brief*, p. 18); that "the indictment could just as well apply" (*Brief*, p. 19) to one type of broadcast (as in the *CIO* case) as to the other (flagrant electioneering); that "no equivalent specific facts are alleged [as in the *CIO* case]" (*Brief*, p. 19); and "there is nothing on the face of this indictment which describes the character of the broadcast" (*Brief*, p. 5-6). It therefore suggests that "whether the financing of a particular broadcast is in fact an 'expenditure' under the statute must be determined

on the basis of the proof to be developed at a trial" (*Brief*, p. 23).

Thus the Government asserts that the indictment, because of its generality, *may include either legal or prohibited conduct*, that the indictment need not furnish a criteria of guilt nor state the material facts which make for criminality, and, finally, that it is enough if the material facts which make for criminality are "determined on the basis of the proof to be developed at a trial."

A moment's examination of these contentions shows their frailty. The district judge could not have construed the indictment so broadly that either legal or illegal conduct might have been shown within its confines, depending on the proof elicited at trial. An indictment which is consistent with innocence or guilt is defective, for an indictment must assert guilt rather than the mere possibility of guilt. *United States* v. *Cruikshank*, 92 U.S. 542; *United States* v. *Carll*, 105 U.S. 611; *Blitz* v. *United States*, 153 U.S. 308, 313-15. Every material element of an offense must be alleged, and if all that is alleged may be proven and yet the accused may still be innocent, then a material allegation has been omitted. *United States* v. *Cruikshank, supra; United States* v. *Carll, supra; Blitz* v. *United States, supra.*[9]

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[9] Thus the Government's concession that the indictment "could just as well apply" (*Brief*, p. 19) to the expression of union views as to an electioneering subsidy to a candidate is fatal. Such an indictment is not inconsistent with innocence. It leaves open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89.

As stated by the court in *United States* v. *Metzdorf*, 252 Fed. 933, 937 (D.C. Mont. 1918):

> "Statutory language is not sufficient in cases where, as here, it may apply to innocent as well as to guilty acts. The indictment must add to the statutory words enough to directly and positively charge the offense denounced by the statute, so that, if all be proven, the defendant cannot be innocent. Otherwise, the presumption of innocence requires construction favorable to the accused."

The accused is not required to wait until the Government presents its proof to be informed in what respect his conduct has been criminal; otherwise an indictment would fail to advise the accused of the nature of the offense sufficiently to enable him to prepare his defense. *United States* v. *Cruikshank, supra* at 557-9. In other words, so that the accused may prepare his defense and so that the judge may determine whether the acts alleged will necessarily sustain a conviction,[10] indictments must assert *all* the material facts upon which criminality depends. *United States* v. *Debrow*, 346 U.S. 374; *United States* v. *Cruikshank, supra; United States* v. *Hess*, 124 U.S. 483.[11] What the Government expressly asserts it may do under this indictment, the foregoing time-tested rules expressly forbid. If the criminality of a union television broadcast depends on either the content of the broadcast or the intent to contribute to a candidate,[12] these critical factors must be *alleged*.[13] Yet the Government

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A succinct statement of the rule appears in *United States* v. *Goldberg*, 123 F. Supp. 385, 388 (D.C. Minn. 1954) where the court says that an indictment "is not sufficient if by its generality it may embrace acts which it was not the intent of the statute to punish."

[10] "In short, I cannot tell from the indictments whether a crime has been committed—even if all the facts alleged are proved at trial. This alone renders the indictments insufficient." *United States* v. *Johnson*, 53 F. Supp. 167, 171 (D.C. Del. 1943); *Cf. Fontana* v. *United States*, 262 Fed. 283, 288 (C.C. 8, 1919).

[11] Rule 7(c) of the Federal Rules of Criminal Procedure has in no way altered this requirement. See *United States* v. *Debrow, supra*. While this rule requires that an indictment "set forth without unnecessary embroidery the essential facts constituting the offense . . . an allegation for lack of which the prosecution must evidently and as a matter of law fail cannot be regarded as superfluous." *United States* v. *Lamont*, — F. 2d — (CA 2) decided August 14, 1956.

[12] "Where the intent is a material ingredient of the crime it is necessary to be averred." *Evans* v. *United States*, 153 U.S. 584, 594; *United States* v. *Cruikshank, supra; United States* v. *Britton*, 107 U.S. 655, 666-68; *United States* v. *Corbett*, 215 U.S. 233, 243.

[13] The accused must receive sufficient informataion to enable him to reasonably understand, not only the nature of the offense, but the particular act or acts touching which eh must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be

argues that the electioneering and sloganeering content and the intent to contribute to a candidate, matters not alleged in the indictment, are the critical factors, distinguishable from merely the expression of union views, which make for criminality.

(ii) An indictment which requires proof of nothing more than the expression of union views but which also permits proof of flagrant electioneering intended to contribute to a candidate, is also unconstitutionally vague. This Court has held that, like the criminal statutes under which they are drawn, indictments must establish the test by which permissible conduct is differentiated from the forbidden. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89-92; *Weeds, Inc.* v. *United States*, 255 U.S. 109.[14] Criminal indictments, like criminal statutes, must prescribe a determinable standard of guilt. *United States* v. *L. Cohen Grocery Co., supra; cf. United States* v. *Cruikshank, supra.* Under the Government's view of the indictment, it runs the gamut from expression of union views to flagrant electioneering and sloganeering intended to contribute to a campaign. Yet no guide is ascertainable from this indictment to differentiate "expression of union views" from "flagrant electioneering" and similar acts. The Government's effort to make the controlling distinctions depend upon unalleged matters of intent and content to be shown at trial fails to satisfy the Sixth Amendment's requirement of specificity.

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left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description of the alleged offense." *United States* v. *Potter*, 56 Fed. 83, 89-90 (C.C.D. Mass. 1892).

[14] *Cf. Screws* v. *United States*, 325 U.S. 91, 128 (concurring opinion); *United States* v. *Willard*, 8 F. Supp. 356 (D.C. Mich. 1934); *United States* v. *Sosnowitz*, 50 F. Supp. 586 (D.C. Conn. 1943); Heller, *The Sixth Amendment* (1951), p. 104.

(iii) But whether it be because of the vagueness rule or the rule requiring indictments to be inconsistent with innocence (and these are but two ways of highlighting the same defect), manifestly the district judge had no choice but to construe the indictment as he did. Even if the Government had argued below for its present view of the indictment, which it did not, these rules would have prevented the district judge from allowing the Government to take advantage of what it admits is the "general nature of these allegations" (*Brief*, p. 15)—allegations which fail to prescribe a standard of guilt or to indicate the content of the broadcast or the intent to contribute to a candidate. The district court could not, consistent with the rules of criminal pleading, have read into the indictment what it omits.

It is these reasons which would have compelled the district court to reject the Government's present contentions as to the scope of the indictment had they been presented to him. In the absence of such a presentation, however, the court properly assumed that the Government did not seek to prove what it did not allege in its indictment and held that an allegation of a public endorsement of a candidate charged merely a public statement of the union's position rather than a scheme to subsidize a candidate's campaign by a program of electioneering and sloganeering.[15] And as we have seen, that court's construction is not open to challenge by the Government on this appeal.

6. *Appropriate Disposition of Government's Direct Appeal*

In drafting its indictment, the Government failed to set forth the contents of the allegedly prohibited commercial

[15] Thus the Government's statement that the district court "failed to note" that the indictment would permit proof of these matters of intent and content (*Brief*, p. 19) is less than fair to the judge below. This district court failed to make specific reference to intent and content because the Government had never suggested these matters as issues in any way. His opinion does not merely overlook the possibility of proving such matters; it excludes that possibility. See *supra*, pp. 14-19.

television broadcasts and failed to set forth any specific intent on appellee's part to contribute directly or indirectly to the campaign of any candidate. Without suggesting any particular motivation for so general an indictment, it seems clear that the Government draftsmen did in fact prepare an indictment against appellee generally similar to the CIO indictment, except that the "house organ" in the indictment in the *CIO* case became a commercial television broadcast in this case. In other words, the draftsmen of the indictment against appellee were relying for their distinction of the *CIO* case upon the difference between a payment by a union to inform its membership of its position on candidates through a union newspaper and a payment by a union to inform its members and the public of its position on candidates through a commercial television channel.

As we have already seen (see pp. 14-17, *supra*), this was also the position of the Government before the court below. The Government's efforts to avoid the force of the *CIO* decision before the district court were not predicated upon any charges of electioneering or sloganeering or intent to contribute; rather the Government based its entire argument in the court below on the difference between expenditures for a union newspaper and for a commercial television broadcast. *Brief in Opposition to Defendant's Motion to Dismiss the Indictment*, p. 4. As already noted, the district court rejected the distinction urged by the Government below and followed the *CIO* case as a controlling precedent in ruling upon the indictment before it.

The Government then filed a direct appeal to this Court under the Criminal Appeals Act and sought to advance the case for argument prior to the summer recess "in view of the importance of the question at this time" (*Brief in Opposition to Appellee's Motion to Affirm and Appellant's Motion to Advance*, p. 9). No doubt the Government's understandable desire to obtain an authoritative decision prior

to the election induced it to take a direct appeal to this Court. Once here, however, the Government was faced with the not unlikely possibility that this Court would reject the distinction between a "house organ" and a commercial television broadcast and would apply the *CIO* case to the indictment at bar just as the court below had done and just as the United States Court of Appeals for the Second Circuit had done. *United States* v. *Painters Local Union*, 172 F. 2d 854 (CA 2, 1949). Faced with this possibility, the Government for the first time sought to add new elements of differentiation to its present case—electioneering or sloganeering and the intent to contribute. In a word the Government seeks in this Court to shift its distinction of the *CIO* case from the means of communication to the content and intent of the communication. But this shift, as we have already seen, comes too late.

The Government, having taken a direct appeal to this Court, is bound by the construction of the indictment below. It may not, as it has sought to do in its brief, argue the issue of statutory construction and constitutionality upon the basis of its own interpretation of the indictment contrary to that of the lower court. Having taken its appeal to this Court at a time when it sought an early authoritative decision on the matters in issue, it cannot now obtain a review of the hypothetical set of facts it now urges upon this Court; nor can it, having appealed to this Court, now bring about a remand to the United States Court of Appeals for the Sixth Circuit by raising questions of interpretation beyond the authority of this Court to review. Nor should this Court, on its own motion, remand the case to the United States Court of Appeals for the Sixth Circuit, since the Court of Appeals will not be free to act upon the indictment as now construed by the Government. The interpretation of the indictment which the Government now urges upon this Court was not urged in the court below and, therefore, could not be considered by the Court of Ap-

peals.[16] In addition, the construction urged by the Government will only result in the invalidation and dismissal of the indictment (see pp. 22-26, *supra*). The Government having concurred below in the construction of the indictment proffered by appellee and adopted by the district court and having taken a direct appeal to this Court, appellee ought not now be forced into another forum for the consideration of matters of interpretation of the indictment not raised in the district court and therefore not properly before any appellate forum.[17] We respectfully urge

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[16] Appellant cannot change the nature and theory of the action or the pleadings from that urged in the trial court, *Virginia Railway Co.* v. *Mullens*, 271 U.S. 220, *cf. Perego* v. *Dodge*, 163 U.S. 160, for he cannot complain of an error which he invited by his action before the trial court. *New York Life Ins. Co.* v. *Calhoun*, 114 F. 2d 526, 543 (CA 8, 1940), *cert. denied* 311 U.S. 701; *Capella* v. *Zurich General Acc. Liability Ins. Co.*, 194 F. 2d 558 (CA 5, 1952); *Orenstein* v. *United States*, 191 F. 2d 184, 193 (CA 1, 1951); *Smails* v. *O'Malley*, 127 F. 2d 410 (CA 8, 1942). Likewise, appellate courts refuse to consider questions not brought to the attention of or passed upon by the trial court, including objections addressed to the form or sufficiency of indictments. *Breese* v. *United States*, 226 U.S. 1; *Holmgren* v. *United States*, 217 U.S. 509; *Pickett* v. *United States*, 216 U.S. 456. This is especially true where, as here, the error complained of was fostered by appellant's implied or expressed concurrence in the trial court's action. Thus a district court's construction of the pleadings, concurred in by the parties, cannot be questioned for the first time on appeal. *New York Life Ins. Co.* v. *Calhoun, supra; Harkin* v. *Brundage*, 13 F. 2d 617 (CA 7, 1926), rev'd for other reasons, 276 U.S. 36; *Houle* v. *Helena Gas & Electric Co.*, 31 F. 2d 671 (CA 9, 1929); *Meyer* v. *W. R. Grace & Co.*, 290 Fed. 785 (CA 7, 1923); *Martin* v. *Imbrie*, 262 Fed. 44 (CA 2, 1919); *cf. San Juan Light & T. Co.* v. *Requena*, 224 U.S. 89; *Missouri, K. & T. Ry. Co.* v. *Wilhoit*, 160 Fed. 440 (CA 8, 1908).

[17] This Court has remanded where the Government has brought direct appeal "erroneously to this Court" (see *United States* v. *Wayne Pump Co.*, 317 U.S. 200, 209), and recently did so in *United States* v. *Jones*, 345 U.S. 377, where the Government conceded that its appeal "should have been taken to the Court of Appeals". *Memorandum for the United States*, pp. 3-4. But the statute's purpose of saving the Government's appeal where it erroneously believes a district court's decision to be based solely on the construction or invalidity of a statute (*Wayne Pump, supra*) has no application here. The Government has not chosen the wrong tribunal; it errs only in its effort to save the indictment here by a construction waived in the district court.

this Court to review the issue of statutory construction raised by the indictment as construed by the district court. We are, therefore, presenting to the Court our arguments with respect to the interpretation of the statute on the basis of the district court's interpretation of the indictment and with respect to the constitutional issues that would be raised if the statute were construed to prohibit the acts charged in the indictment.

## II

### Payments by a Labor Union for Commercial Television Broadcasts to Inform Its Members and Others of the Position of the Union on Candidates for Representatives or Senators in Congress Are Not Expenditures Prohibited by 18 U.S.C. 610

In the nine years since the passage of the 1947 amendments to the Federal Corrupt Practices Act making expenditures unlawful and applying the Act to labor organizations, only three prosecutions of labor organizations (and none of corporations) were instituted prior to the present indictment.[18] In all of these cases, the courts, including this Court, have held that the acts charged were not within the purview of the statute. *United States* v. *CIO*, 335 U. S. 106; *United States* v. *Painters Local Union*, 172 F. 2d 854 (CA 2, 1949); *United States* v. *Construction and General Laborers Local Union*, 101 F. Supp. 869 (W.D. Mo. 1951). Because of the direct relevance of the *CIO* and *Painters Local* cases, we deal with them in detail.[19]

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[18] Hearings Before the Subcommittee on Privileges and Elections of the Committee on Rules and Administration, United States Senate, 84th Cong., 1st Sess., on S. 636, p. 203.

[19] The *Construction and General Laborers* case involved union payments for activities by three union employees in putting up posters, passing out cards and pamphlets, driving voters to register and to the polls, and driving a campaign van, all for the election of a Congressional candidate.

The *CIO* case involved an indictment against the Congress of Industrial Organizations and Philip Murray, its President, because of the publication in the CIO News, a weekly owned and published by the CIO from its general funds, of a front-page statement by Mr. Murray urging that a particular candidate be supported in a special Congressional election in Maryland. The district court sustained a motion to dismiss the indictment on the ground that the statute was unconstitutional as an unwarranted abridgment of the First Amendment. In arguing the Government's direct appeal under the Criminal Appeals Act, both the Government and the CIO touched only upon the constitutionality of the statute. No argument was made by either side concerning the propriety of the indictment under the Act. Nevertheless, a majority of this Court, holding that the Court's first obligation is to avoid grave issues as to the constitutionality of a statute, considered first whether the indictment stated an offense under the statute and held that the Act did not cover the publication by a union from its general funds of a regular periodical advocating the election to office of particular candidates. *United States* v. *CIO*, 335 U. S. 106. The Court came to this interpretation on the basis that any other would involve "the gravest doubt" of the constitutionality of the statute (335 U. S. at p. 121) and would not give due recognition to the fact that "Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment" (335 U. S. at p. 120).

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The district court held that none of these activities constituted either a "contribution" or an "expenditure" as charged in the indictment. Obviously that case goes far beyond a union's expression of views on candidates and goes far beyond anything required to uphold the decision of the district court below.

This conclusion was reached despite the apparently all-inclusive language of the statute and some convincing legislative history to the contrary (see debates set out in 335 U. S. at pp. 116-120).[20] As this Court has itself stated in a subsequent decision, it "strained words" in the *CIO* case (see *United States* v. *Rumely*, 345 U. S. 41, 47) to avoid the difficult and highly controversial constitutional issues which would have been raised by a broader interpretation of the statute.

The net result of the Court's decision was stated by Justice Reed for the majority of the Court (335 U. S. at p. 123):

> "It is our conclusion that this indictment charges only that the CIO and its president published with union funds a regular periodical for the furtherance of its aims, that President Murray authorized the use of those funds for distribution of this issue in regular course to those accustomed to receive copies of the periodical[21] and that the issue with the statement described at the beginning of this opinion violated § 313 of the Corrupt Practices Act.

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[20] These debates in Congress clearly showed that no expenditures for official organs, such as the CIO News, were intended to be permitted unless funds came from subscriptions or other separate sources. This was the understanding of the legislative history by the Government (Brief for the United States, *United States* v. *CIO*, No. 695, Oct. Term, 1947, pp. 44-46) and was generally accepted by the CIO (Brief for Congress of Industrial Organizations, *United States* v. *CIO* No. 695, Oct. Term, 1947, p. 56). See also Brief on Behalf of American Federation of Labor, Amicus Curiae, in the same case at pp. 1-2.

[21] Another instance of the "strained" construction into which the Court was forced by its desire to avoid the constitutional issue is the view it took of certain allegations of the indictment. Although the indictment contained allegations about expenditures for 1,000 "extra copies" of the challenged issue of the CIO News, the Court did "not read the indictment as charging an expenditure by the CIO in circulating free copies to nonsubscribers, nonpurchasers or among citizens not entitled to receive copies . . . as members of the union" (335 U.S. at p. 111).

> "We are unwilling to say that Congress by its prohibition against corporations or labor organizations making an 'expenditure in connection with any election' of candidates for federal office intended to outlaw such a publication. We do not think § 313 reaches such a use of corporate or labor organization funds. We express no opinion as to the scope of this section where different circumstances exist and none upon the constitutionality of the section."

Four justices of this Court were unable to go along with the majority's construction and wrote a concurring opinion holding that the Act clearly violated the rights of freedom of speech, press, and assembly secured by the First Amendment.

This Court has thus specifically ruled that expenditures in publishing a union newspaper and distributing copies thereof to those accustomed to receive them are not "expenditures" within the meaning of Section 610. The court below could find no distinction in the statute between payments to make possible the expression of the union's views in a union newspaper and payments to make possible the expression of the union's views over a commercial television station. Certainly there is no statutory language on which such a distinction could be predicated. Equally clearly, the legislative history offers no ground for any such distinction; indeed the discussion on the floor of the Senate evidenced a concern with the expression of union views through a union newspaper at least as great as with the expression of a union's views through commercial channels. 93 Cong. Rec. 6436-6440. Furthermore, the policy of interpreting the statute in such a way as to avoid constitutional questions applies with at least equal force to the indictment now before the Court. For, as the district court said, appellee "desired to inform its members and others of the position

of the Union on those seeking certain federal offices. It was exercising the right of free speech" (R. 43). Indeed, since the union was here seeking to communicate with the public at large, rather than simply a segment of the public (its own membership), it was exercising the more traditional right of free speech. It is this very communication with the public at large that brings about the "free political discussion" (*DeJonge* v. *Oregon*, 299 U.S. 353, 365) and the "informed public opinion" (*Grosjean* v. *American Press Co.*, 297 U.S. 233, 250) which "lies at the foundation of free government by free men." *Schneider* v. *State of New Jersey*, 308 U.S. 147, 161.

Every practical consideration of American life calls for the rejection of a line between a union expressing its views to its own membership and a union expressing its views to the public at large. Appellee union has particularly sought to carry on its work as part of the general community and has sought to participate in every aspect of community life. There is, indeed, a certain repugnance in the idea that the union as an entity should be in a position to cooperate with all other citizens in all aspects of community life, but should be set apart in that very political activity upon which our democracy depends. One cannot believe that Congress intended any such result.

The court below was not the first court that could find no legal distinction in the difference between the expression of a union's views in a union newspaper and the expression of its views over a commercial broadcast station. *United States* v. *Painters Local Union*, 172 F. 2d 854 (CA 2, 1949) involved an indictment brought prior to this Court's opinion in the *CIO* case, alleging that the defendant union (and its President) had placed and paid for a political advertisement in a daily newspaper of general circulation and had paid for and sponsored a political broadcast over a commercial radio station. The funds for these expenses were

derived from the general treasury of the union. Both the advertisement and the radio broadcast advocated the defeat of Senator Taft as a candidate for the presidency and the rejection of all incumbent Republican congressmen.

The defendants had moved for dismissal and acquittal below on constitutional grounds and the case had been argued both in the district court and before the judges of the Second Circuit solely on the constitutional issues. No contention was made by the defendants that the statute was inapplicable. Judge Hincks, in the district court (79 F. Supp. 516 (D. C. Conn. 1948)), denied the motion for dismissal and acquittal and held that the statute was constitutional. In denying the motion to dismiss, he described the expenditure alleged in the indictment in terms directly applicable to this case. He said (at pp. 518-519):

> "Here the charge is that in connection with a federal election . . . union monies were expended for a publication of expressions of political advocacy intended to affect the result of the election and the action of the convention in an established newspaper of general circulation and for a broadcast by a commercial radio station serving the general public."

The Court of Appeals for the Second Circuit reversed. Judges A. Hand, Clark and Frank constituted the bench, and, like this Court in the *CIO* case, avoided the constitutional issue by a ruling on the scope of the statute. They held that these political advertisements in media of information commercially-owned and of general circulation were not prohibited "expenditures".[22] Judge Hand, writing for

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[22] From this landmark decision on facts identical with the case at bar no petition for certiorari was filed by the United States. To quote Mr. Justice Frankfurter's concurring opinion in *Andres* v. *United States*, 333 U.S. 740, 756, commenting on a similar failure: "While a failure of the Government to seek a review of that decision by this Court has no legal significance, acquiescence by the Government in an important ruling in

the Court, said (page 856) that "it seems impossible, on principle, to differentiate the scope of that decision [*United States* v. *CIO*] from the case we have before us" and he noted that any differentiation between a union-owned newspaper such as was involved in the *CIO* case, and an independent newspaper or radio station "seems without logical justification; nor is such a differentiation suggested by the apparent purposes or by the terms of the statute or by its legislative history."

In reaching its conclusion that the statute was inapplicable to general newspaper and radio advertising, the Court of Appeals did not rely on any specific legislative history or other indication of congressional intent. It relied on its analysis of the meaning of this Court's decision in the *CIO* case, and particularly on the majority's declaration that the addition of "expenditures" was not intended "to extend greatly the coverage of the section". It emphasized (p. 856) that all nine Justices of this Court had either thought the statute unconstitutional or of "exceedingly doubtful constitutionality" so that in reality, the constitutional question was not "of first impression". Therefore, it felt "constrained" to hold that the statute did not cover the facts of the case.[23]

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the administration of the criminal law . . . carries intrinsic importance where the construction in which the Government acquiesced is not one that obviously is repelled by the policy which presumably Congress commanded."

[23] The Government's attempted distinctions of the *Painters Local* case (*Brief*, p. 20) are without force:

(i) The suggestion that the expenditures "were expressly authorized at a special membership meeting" is a total irrelevancy so far as the statute is concerned; indeed there is not the slightest hint in the indictment at bar that appellee did not act with equal authority from the appropriate governing body of the appellee union.

(ii) The suggestion that the expenditures were "very small" falls before the fact that there is nothing in the word "expenditure" in the statute, or in the legislative history, or in the constitutional principles here at stake which warrants the drawing of a line based on the size of the

Thus authority supports logic in demanding the application of the *CIO* case to the indictment at bar. We turn now to the Government's arguments to the contrary. We will not, however, make further response to those of the Government's arguments which, going beyond the district court's construction of the indictment, are based on the content of the communications or the intent with which they were made. As already pointed out (see pp. 14-20, *supra*), these arguments are not properly before the Court.

(1) The Government argues that the use of general union funds to finance commercial television broadcasts supporting particular candidates in a federal election is "squarely within the literal language of the statute" (*Brief*, p. 17). Admittedly this is so. But no less did the expenses involved in the *CIO* case for the publication and distribution of the union's views through a union periodical fall within the literal meaning of the term "expenditure". Yet, because of this Court's obligation to avoid grave constitutional issues and because the word "expenditure" had been added to the statute "to eradicate the doubt that had been raised as to the reach of 'contribution,' not to extend greatly the coverage of the section" (335 U. S. at p. 122), this Court narrowed the literal terms of the word "expenditure" to exclude a union's expression of views in a union

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expenditures; indeed such a line, by its very vagueness, would create more problems than it settled. Judge Picard stated in his opinion that he thought it would be "presumptuous" for the courts to write into the statute a distinction, nowhere suggested by Congress, based on the amount of the expenditure (R. 43).

(iii) The suggestion that this union "owned no newspaper" and therefore had to communicate its views to its members through public facilities is hardly a ground of distinction, both because the Court of Appeals did not make it a ground of distinction and because no rational line could be drawn between those unions which have newspapers and those which do not. No doubt all unions have some adequate method of communicating with their members, such as a mailing list, to whom a mimeographed statement could be sent.

periodical. The Government suggests no reason why the literal meaning of the term "expenditure" is any more applicable in the case now before the Court than on the facts presented in the *CIO* case nor why the same considerations which led the Court to narrow the application of the term "expenditure" in the *CIO* case are not equally present in this case.

(2) The Government places special reliance upon the legislative history of the statute and particularly upon statements made by Senator Taft indicating that the statute would prohibit a union from purchasing broadcast time to state its views on a forthcoming election (*Brief*, pp. 30-36). But in this very same debate from which the Government quotes, Senator Taft gave the identical answer with respect to the expression of a union's views in a union periodical.[24] When asked whether a labor house organ would be permitted under the pending bill to carry an endorsement for a candidate considered friendly to labor, Senator Taft replied, "If it were supported by union funds contributed by union members as union dues it would be a violation of the law." 93 Cong. Rec. 6436. The same opinion was expressed by Senator Taft in another part of this same discussion:

> "Mr. Magnuson. . . . They [labor groups] publish so-called labor organs, and a part of a member's dues goes to subscribe for the labor organ. If such an organ were not published the member's dues would be correspondingly less. . . . But now unions collect the subscription along with the dues.

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[24] Both parties in the *CIO* case assumed that the legislative history supported the proposition that the expenses of publishing a union newspaper from union funds constitute "expenditures" within the meaning of the statute. Brief for the United States, *United States* v. *CIO*, No. 695, October Term, 1947, p. 44 *et seq.* and Brief for the Congress of Industrial Organizations, *United States* v. *CIO*, No. 695, October Term, 1947, p. 56.

"Mr. Taft. The case is the same as the case of a corporation house organ. A corporation house organ is published and sent out to employees, sometimes many thousands of them. A corporation which used such a house organ to try to elect or defeat a political candidate would certainly be violating the law, in my opinion. Such a law has been in existence for 25 years. What we are now doing is to write into the law the same prohibition with respect to labor organizations as now exists with respect to corporations." 93 Cong. Rec. 6440.

In the *CIO* case, this Court rejected Senator Taft's clearly stated views as to the meaning of the word "expenditure" in connection with the expression of a union's views in a union periodical, explaining that "it would require explicit words in an act to convince us that Congress intended" such a result.[25] The Government fails to suggest any reason why this Court should give greater significance to Senator Taft's comments on broadcasts than it did to his comments on union periodicals.

(3) The Government's primary argument against the district court's interpretation of the statute seems to be that "the decision below actually results in a holding that *no* union-financed political broadcasts, regardless of charac-

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[25] This Court's rejection of Senator Taft's statements may have been facilitated by the circumstance that the Senator had no part in the origination of the "election expenditures" provision of the Act (Section 304, now 18 U.S.C. § 610). The provision was in the House bill, H.R. 3020, § 304, but not included in Senator Taft's bill, S. 1126. It was passed by the House, accepted by the Senate Conferees and subsequently debated by Senator Taft and others on the floor of the Senate. It might be noted, too, that subsequent to the three judicial decisions already cited, Senator Taft brought about the repeal of the "expenditure" prohibition in the Senate. S. 249, 81st Cong., 1st Sess., 1949, as amended and adopted June 30, 1949. The bill died when the House of Representatives failed to take action upon it.

ter or surrounding circumstances, can ever be in violation of the section" (*Brief*, p. 22). But this statement is both inaccurate and irrelevant. In light of the construction of the indictment by the district court, there are many types of union broadcasts which were not ruled outside the term "expenditure" by his decision. The Government itself has provided one such example not covered by the decision below —repeated sloganeering such as "Vote for Mr. X, the union's friend." Whether an expenditure for such a broadcast is within the prohibition of 18 U.S.C. 610 is not before this Court on this indictment; but certainly the decision below did nothing to exclude such a broadcast from the coverage of the statute. Furthermore, even if all union-financed political broadcasts were excluded from the statute in deference to the constitutional issue of free speech that might otherwise arise, this would not mean that the "expenditure" provision would be without force and effect. There are many types of expenditures other than those in the area of speech that might still come within the reach of the statute and thus give meaning to its terms. For example, the payment of any expenses of the candidates themselves or the placing of facilities at the disposal of candidates might well prove to be the type of indirect contribution which Congress meant to bar through its addition of the word "expenditure" in the 1947 amendments. If it should ultimately be held that all political broadcasts are outside the scope of the statute, either as a matter of statutory construction or of constitutional right—which the district court certainly did not hold—the statute would still not want for force and effect.

(4) Finally, the Government contends that "paying for a political broadcast on behalf of a particular candidate . . . differs but little from a direct contribution; the distinction lies only in the fact that in one instance the

candidate would apply contributed funds to purchase television time and in the other the union would buy it for him" (*Brief*, p. 17). We respectfully submit that there is a substantial difference between a union stating its own views on a television program and a union purchasing television time for a candidate to state his views in his own way.[36]

When unions or corporations or individuals or groups of individuals, under their own names and auspices, express their own views on candidates, they are exercising the right of free speech either as organizations or as individuals. This is a far cry from the payment for a broadcast on which the candidate expresses his own views in his own way. In the first place, such an exercise of free speech by a union or corporation may or may not benefit the particular candidate involved. Thus a television address by Walter P. Reuther, appellee's President, explaining the union's position in favor of a candidate in Mississippi, might well be less than helpful to the candidate there in view of Mr. Reuther's well-known advanced views on civil rights. In the second place, when the union expresses its views on a candidate, it is injecting its position into the broadcast rather than the position of the candidate. Thus, even in an area where the expression of union views would generally be helpful to the candidate, the union might still stress matters of interest to it rather than those on which the candidate would prefer to base his campaign. In the third place, an expenditure for a broadcast to express the union's views has none of the possible corrupting influence

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[36] Additional factual situations are also possible. A candidate might be asked to participate in a union program for the purpose of obtaining public answers from the candidate on questions of interest to the union and thereby helping to assure that the candidate would live up to those answers in the future. Furthermore, a union might request both candidates to participate in its programs in the belief that such participation would aid in public understanding of the issues, and both or only one of the candidates might accept the invitation.

of large contributions to the candidate himself.[27] Thus it seems quite clear that the expression over a commercial television program of the union's views is not, as the Government would have the Court believe, the same thing as a contribution to the candidate. Of course, as already pointed out, the indictment does not charge a contribution and counsel for the Government reinforced this point in the court below (R. 24).

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For six years after the *CIO* and *Painters Local* decisions, no prosecutions were brought against unions for the expression of their views via commercial newspapers and radio and television stations and unions were left free to express their views on elections. The reason for this inaction by the Government was given by the Assistant Attorney General of the United States in whose jurisdiction prosecution of cases under this statute falls. Assistant Attorney General Warren Olney, III, in charge of the Criminal Division, testified in May, 1955, in hearings on possible amendments to the Federal Corrupt Practices Act,[28] that because of the shortcomings in this statute, there have been only three prosecutions under this section.[29] He attributed this result to what he described as the "view that the [Supreme] Court takes as to the importance of leaving open all media of public expression for political candidates

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[27] The Government speaks of "the reciprocal obligations of the political candidate" for the political support of the union (*Brief*, p. 55). But certainly these "reciprocal obligations" are far less, if they exist at all, where the union states its position on a forthcoming election than when it contributes directly to the candidate.

[28] Hearings before the Subcommittee on Privileges and Elections of the Committee on Rules and Administration, United States Senate, 84th Cong., 1st Sess., on S. 636, pp. 201, 202-203, 209-210.

[29] The *CIO* case, *supra*; the *Painters Local* case, *supra*; the *Construction and General Laborers* case, *supra*.

and for supporters." He went on to say that, although this Court had not directly ruled on the constitutionality of the statute, "out of the 9 members of the Supreme Court there was not 1 that expressed the view that section 313 [18 U.S.C. § 610] was constitutional. There were 4 of them who were of the view that it was not, and the majority, the other 5, did not pass on the question, but put a caveat in their opinion that they had serious doubt about the constitutionality of it."

Mr. Olney went on to discuss a proposed amendment to the Act which would require consent or authorization by a candidate before a political committee could engage in certain types of political activity. Mr. Olney said:

> "The implication of the language of all the judges, both the dissenting and the majority opinions in that case [*United States* v. *CIO*, *supra*] is that they have serious doubts about a law which says that a group of people interested in a campaign cannot really—and that means without restrictions even as far as finances are concerned—engage in political activity. They indicate a clear reservation that it may be affected by the first amendment that guarantees freedom of the press and of speech.
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> "In this provision, the way it is worded now, you see, it is not aimed at requiring the publication of information so that it is fair to the voters, it is a prohibition against the committee collecting money or actively supporting the candidate, if the candidate doesn't want them. . . .
>
> "The thing that it would require is an open public disclosure of the fact as to whether the activity is endorsed by the candidate whom it is supporting, or whether it isn't.

"I do think that the question of the constitutionality of that section is important. And I have serious reservations about it."

Mr. Olney was then questioned by the Committee members, and the following colloquy ensued:

"Mr. Duffy. You also referred to the constitutional question which arises as concerns section 304 of this proposed bill which purports to amend section 610 of title 18, which I believe is the same as the Taft-Hartley Act as it stands today.

"Do you believe that it would be better to leave section 610 of title 18 exactly as it is, or do you think that by allowing it to stand unchanged you would still be confronted with the constitutional problem as stated in the CIO case?

"Mr. Olney. Well, if section 304 of 636 is enacted, it still will not affect the dilemma and the difficulty that we are faced with because of the CIO decision.

"Mr. Duffy. It wouldn't help you at all?

"Mr. Olney. No, it wouldn't.

"Mr. Duffy. In fact, it might increase the difficulty; is that true?

"Mr. Olney. Yes; simply because it would be a new expression by Congress reaffirming this same statute notwithstanding the CIO decision. I am sure you can imagine the consternation of my predecessors when the Supreme Court disposed of that CIO case by ducking the issue. They just didn't pass on the constitutional point. *They expressed so many doubts about it, all of them did, that it made it almost impossible, certainly impractical, to prosecute under it.*" (Emphasis added.)

Thus, as of May, 1955, this Court's decision in the *CIO* case made it "almost impossible, certainly impractical, to prosecute" under Section 610. One can only speculate on what happened after May, 1955, to cause the Department of Justice to reverse its position and seek to prosecute under the statute.[30] Certainly no judicial decision intervened and indeed the only judicial decision between Mr. Olney's statement before the Senate Committee and the Government's Brief in this Court is Judge Picard's decision following the *CIO* case in line with Mr. Olney's testimony. We do not refer to Mr. Olney's pre-indictment position here to embarrass either him or the Government, but rather to point out how recent is the Government's belief in the narrow application of the *CIO* case and how different is the Government's position here today from its objective judgment prior to this indictment.

It is respectfully submitted that, upon the district court's interpretation of the indictment and this Court's opinion in the *CIO* case, the decision below should be affirmed.

We turn now to those serious constitutional questions with which this Court would be faced if it should hold that Section 610 prohibits a payment by a union for a television broadcast to inform its members and others of the position of the union on those seeking certain federal offices. That these *are* serious constitutional issues sufficient to warrant a construction which would avoid the necessity of their resolution at this time is demonstrated both by the majority and the minority opinions in the *CIO* case. We believe,

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[30] Shortly after Mr. Olney testified, the Chairman of the Republican State Central Committee of Michigan, one John Feikens, testified before the Subcommittee on Privileges and Elections. Mr. Feikens made a number of allegations concerning expenditures by labor unions for political purposes and specifically referred to the series of television broadcasts with which this indictment is concerned (Hearings, *supra*, n. 28, at pp. 236, 242).

however, that, while a decision on the constitutional issues is not necessary in this case, the Court may wish to have before it the pertinent arguments on the constitutional issues.

## III

### Section 610 Abridges Freedom of Speech, of the Press, of Assembly and of Petition in Violation of the First Amendment to the Constitution of the United States

Before this Court reaches this difficult constitutional issue involving the statute's effect on First Amendment freedoms, Section 610 must be construed to prohibit the expenditures charged in the indictment as interpreted below. So construed, the statute prohibits payments of money by labor unions for the purpose of disseminating to members and to the public their views about candidates through public media of information. Such a prohibition is an unlawful restraint on the freedoms of speech, press, and assembly and on the right of petition guaranteed by the First Amendment.

#### A. *The First Amendment Is Nowhere More Directly Applicable Than in the Area of Free Political Discussion and Association*

Section 610 prohibits expenditures by labor unions in connection with any federal election and certain enumerated preliminary steps in the electoral process. We shall describe in the next subsection (III B) just how this restraint upon expenditures operates as a restraint upon all those political activities which utilize the freedoms guaranteed by the First Amendment. Here we should like to emphasize to the Court what seems to us the heart of

the constitutional issue treated here: the principle that widespread participation in the electoral process is the foundation of our democracy. Restraints on freedom of speech and press in this area where free political expression is of the greatest importance result in evils far more serious than any which the restraints seek to prevent.

This Court has recognized that it is precisely because free political discussion is the prerequisite to effective democratic change that it must receive the highest degree of protection.[31] In *Stromberg* v. *California*, 283 U. S. 359, 369, Mr. Chief Justice Hughes stated:

> "The maintenance of the opportunity for free *political discussion* to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, *is a fundamental principle of our constitutional system.*" (Emphasis added.)

This same point was stressed in *DeJonge* v. *Oregon*, 299 U.S. 353, 365, where the Court noted that:

> "... the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful

[31] The central theme which appears to underlie the historic decisions of this Court in the area of First Amendment rights has been, from the first, the protection afforded the democratic process by the opportunity for free political discussion. Thus, in *Whitney* v. *California*, 274 U.S. 357, 375, Mr. Justice Brandeis, concurring for himself and Mr. Justice Holmes, foreshadowed the later decisions of this Court with the statement "that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that public discussion is a political duty . . . [is] a fundamental principle of the American government."

means. Therein lies the security of the Republic, the very foundation of constitutional government."

Speaking of the liberty of the press in *Near* v. *Minnesota*, 283 U.S. 697, 717-18, this Court said:

> "Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in State Constitutions:
>
> > 'In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands.' "

The particular importance of a free press as a check upon misgovernment received emphasis in *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250, in the following language:

> "... since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."

The fundamental nature of First Amendment rights as the base of our democratic system was stated again by this Court in *Schneider* v. *State of New Jersey*, 308 U. S. 147, 161:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of

> the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."

The Court's reference to the framers of the Constitution is particularly noteworthy for even in the debates at the Convention the importance of free elections was urged.[32] James Madison, a few years after the beginnings of our government, said in connection with the Alien and Sedition Laws[33] ". . . this is a power which, more than any other, ought to produce universal alarm, because it is levelled against that right of freely examining public character and measures, and of *freely communicating thereon*, which has ever been justly deemed the *only effectual guardian of every other right.*" (Emphasis added.)

More recently, at the very beginning of congressional consideration of the regulation of federal elections in the area of possible corruption, Bourke Cockran, one of the most active proponents of electoral reform legislation, made it clear that freedom of political expression was deemed indispensable to a sound electoral system. He thus testified in support of his proposed bills:[34]

> "The spectacle of this country passing upon a question so intricate as that involved in 1896 . . . the information which the people obtain every four years about the working of their government in all its departments, as well as in the fundamental propositions involved in the legislation likely to affect their condition, is something that has never been witnessed on

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[32] See pp. 82-83, *infra.*

[33] IV Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (p. 561).

[34] Hearings before House Committee on the Election of Presidents, March 12, 1906, p. 40.

this earth before, and, to my mind, this great national quadrennial popular debate is the source from which all the meritorious legislation of this country has proceeded, and it is the chief bulwark of the Government under which we live.

"Whatever else may happen, I don't want the vigor, efficiency, or scope of these Presidential discussions limited, impaired or endangered in the slightest degree. Whatever we may do to check corruption, I hope we will not tolerate any suggestion likely to result in diminishing the number of meetings at which citizens have been in the habit of discussing grave problems of government, of the volume of literature circulated for their information. *At the very threshold of an attempt to prevent expenditures for corruption we should take precautions to maintain and even increase expenditures for enlightenment.*" (Emphasis added.)

Because of this deep concern for preserving the freedom of political expression as the basis for democratic self-government, statutes which restrict that freedom are subject to the most searching scrutiny by this Court. Indeed, this obligation to give full scope to First Amendment freedoms has effectively nullified the usual presumption of constitutionality. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4. The cases indicate that, in fact, there must be clear affirmative support for a deprivation of these rights, and that this rule amounts almost to a presumption in favor of rights guaranteed by the First Amendment. *Thomas* v. *Collins*, 323 U.S. 516, 529, 530; *West Virginia State Board* v. *Barnette*, 319 U.S. 624, 639; *Thornhill* v. *Alabama*, 310 U.S. 88, 95, 96; *Cantwell* v. *Connecticut*, 310 U.S. 296, 311; *Bridges* v. *California*, 314 U.S. 252, 262, 263.

This Court stated the rule in *Schneider* v. *State of New Jersey, supra,* at p. 161:

> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effects of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

Having in view these standards for the examination of a statute involving the abridgment of First Amendment freedoms, we turn now to the breadth of the restraint which the statute imposes on the exercise of the democratic rights of free political expression.

B. *The Statute Prohibits that Free Political Discussion and Association Which Lies at the Heart of the First Amendment*

Section 610, as construed by this Court to reach this point, prohibits payments to television stations, radio stations, newspapers and magazines to disseminate a labor union's views on political candidates. This reading of the statute would likewise appear to interdict all other expenditures of a political nature, such as those for holding public gatherings in support of a candidate, getting out the vote for a particular candidate, distributing placards and campaign literature. Appellee, its constitutent locals and its officials, and through them, the members of appellee union, would be forbidden as a group organized in a labor union to make any expenditure for these traditional and fundamental political activities.

Every one of the described political activities utilizes speech or the press, involves assembly or petition. None of these activities can be carried on without an expenditure. If the statute is construed to cover the facts alleged in this indictment, it will achieve the elimination of organized labor from participation in federal elections and to that extent from public affairs. [35]

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[35] The Government's answer to all this (*Brief*, pp. 39-51) is that the statute has not worked to carry out Senator Taft's dictum that "labor unions are supposed to keep out of politics" (93 Cong. Rec. 6440). The Government takes great pains to point out to this Court that labor may still participate in political action through (i) separate voluntary associations or funds, (ii) intra-union publications allowed by the *CIO* case, (iii) action in behalf of state candidates, and (iv) registration drives (*Brief*, pp. 48-51).

(i) The Government quotes at length (*Brief*, pp. 40-50) from AFL-LLPE and CIO-PAC descriptions of the activities formerly carried on by those organizations with the inference being left that these activities were financed from voluntary contributions rather than union dues. It particularly emphasizes LLPE's publication of a weekly newspaper which discussed pending legislation and carried voting records; its sponsoring of radio broadcasts; and its preparation of phonograph records and other publicity material. In fact, however, these LLPE activities, while generally related to public and political issues, were carried on during a non-election year —1949— and were financed by a special assessment on AFL unions. (*Brief*, p. 50). Unquestionably those unions paid the assessment out of dues money, not out of voluntary contributions.

It has been the experience of LLPE and PAC, and thus far of COPE, that only limited amounts may be raised from individual contributions. See testimony of Jack Kroll and James L. McDevitt, formerly directors respectively of PAC and LLPE and now co-directors of COPE, before Senate Subcommittee on Privileges and Elections, September 10, 1956. The testimony of Kroll and McDevitt leaves no doubt that the amounts which can be raised from individual contributions are quite limited in amount; are used principally for contributions to candidates; and are inadequate to finance any general expression of labor's views over public media of communication.

Furthermore, the Government does not and could not mention any comparable activity in appellee union. We cannot believe that the Government means to suggest that the rights of the appellee union and its members to engage in political activity could properly be satisfied by the work of a federation of which it is but a small part and which includes groups with views considerably at variance with its own.

Nor should the difficulty in raising dollars, which PAC, LLPE and COPE have experienced (Keenan, *The AFL-LLPE and How It Works*,

Moreover, this elimination will directly restrain and equally impair the correlative right of the public to hear and be informed through the exercise of a labor organization's rights under the First Amendment. "The right of freedom of speech and press . . . embraces the right to distribute literature . . . and necessarily protects the right to receive it." *Martin* v. *Struthers*, 319 U.S. 141, 143.

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The House of Labor, pp. 113, 115), come as a surprise to anyone. Union members believe that they have already contributed for all union activities by the payment of their union dues, intended not only for collective bargaining but also for legislative, political and other community activity. No union member expects that he will have to pay twice to have his union's views expressed.

Thus the Government's argument is merely that the prohibition of union political expression is ameliorated by the possibility of alternate, less effective and far more limited means of expression. Such a possibility, real or fanciful, will not suffice. The First Amendment precludes not only prohibition of speech but also abridgment of its full and free exercise. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 249-251; *Thomas* v. *Collins*, 323 U.S. 516, 538-540; *Winters* v. *New York*, 333 U.S. 507; *cf. Wieman* v. *Updegraff*, 344 U.S. 183.

(ii) The allowable activity under the *CIO* case of communicating with the union's own members is hardly that freedom of political activity which the First Amendment protects. American trade unions do not seek to set themselves apart as a special enclave wielding power in America. They seek to operate as an integral part of the general community. The limited freedom of the *CIO* case might very well tend to separate union members from the general community contrary to the public interest.

(iii) The fact that most states have respected the constitutional rights of labor unions is hardly a ground for suggesting that the Federal Government need not do so. Furthermore, we must record a trend in some states to follow the federal lead in this field. See, e.g., Chapter 135, Wisconsin Laws of 1955; Chapter 273, New Hampshire Laws of 1955.

(iv) We cannot believe the Government seriously suggests that the right to get people registered, as distinguished from the right to urge them to use their ballots in a particular way, is the fundamental right involved here.

Finally, all that the Government says in these respects fails to meet its own concession to appellee's case. Thus at page 63 of the Government's Brief it is stated: "*It may be conceded that a labor union, in the interest of the economic function for which it was primarily organized, has a legitimate interest in political affairs and therefore a right as an entity to present its views.*" (Emphasis added.) Nothing in the rights which the Government accords, which we have reviewed above, protects appellee's "legitimate interest in political affairs" and its "rights as an entity to present its views."

Furthermore, the statute denies individual rights of voluntary association. All apart from the right of the union as an entity to express its view on candidates, the rights of the individuals who formed and joined that union for legitimate collective interests are infringed by the prohibitions of the statute. The members of the union, who first wrote its founding purposes by democratic means and who retain the right to alter or amend those purposes by the same means, have not restricted the union to collective bargaining. On the contrary, they have authorized it to protect and further their interests as working men by various means, including the support of candidates who best represent those interests.

Included in the Constitution of appellee union is Article II, Section 4:

> "To educate our membership in the history of the Labor Movement and to develop and maintain an intelligent and dignified membership; to vote and work for the election of candidates and the passage of improved legislation in the interest of all labor. To enforce existing laws; to work for the repeal of those which are unjust to Labor; to work for legislation on a national scale, having as its object the establishment of real social and unemployment insurance, the expense of which to be borne by the employer and the Government."

This clause has been part of the union's constitution since its founding in 1936.

The statute forbids individuals from maintaining labor organizations which advance their interests as working men by political means. Put another way, it forbids working men to act through their labor unions in the political field to protect their collective rights—their rights as union members and the rights of the union in which they

have joined. Even though the choice of candidates may determine whether those rights will be secure or destroyed, the statute prohibits the union from protecting and advancing those rights.

A candidate may favor repeal of the Taft-Hartley Act and outlawing Right-to-Work laws; he may favor a higher minimum wage and a law forbidding discrimination in employment. Yet the union may not spend a penny to express its support of such a candidate. Another candidate may favor applying the anti-trust laws to unions, a Federal Right-to-Work law, and even a law to strengthen the present ban on labor political activities. The union may not spend a penny to express its opposition to such a candidate, whether such opposition be by majority or unanimous action of its members.

From the first, there has been no line of demarcation between the bargaining, educational and political activities of unions. There is a tradition of over 100 years of union political activity in this country.[36] As the Federal Government has increasingly legislated in the field of union activity and on economic matters such as wages, hours and conditions of employment which are of the most immediate concern to laboring men as workers and as union members, the necessity for labor union political activity has correspondingly increased. Today the passage or defeat of any number of bills affecting working men and their unions may be of as great importance to union members as even the collective bargaining process itself. Indeed, the very growth of the union movement in this country to its present stature was achieved at least in part through the pattern of federal labor laws in the 1930s, and the restrictions in effect

[36] At the very beginning of the labor movement in the United States unions employed political action as a primary means of advancing the interests of their members. See Ch. III of *Labor in America*, by Foster Rhea Dulles.

since 1947 materially curb the further growth of that movement.

Under these circumstances the election of candidates to Congress favorable or opposed to the interest of unions and laboring men is far from tangential or irrelevant to the purposes of labor unions. Political action and the public presentation of the union's views on who best represents the interest of working men and their associations, is essential to the preservation and advancement of their common interests. This is recognized by the constitution and organization of appellee as well as every other major labor union in the country. Political representation of union members' interests as union members and workers is at the very center of the purpose for which labor unions are formed and maintained. This is the purpose for which the statute forbids working men to associate in labor organizations.

Our political tradition calls for a constantly increasing participation by citizens in discussions leading to the choice of candidates as well as the final vote. It also calls for an increasing attempt to reach more citizens with discussions of issues and candidates. But this statute deprives appellee and its members of this participation and of the benefit of such discussions. Moreover, the deprivation is so extensive and so complete that the statute cannot be viewed as a regulatory device; it amounts to a complete prohibition of group political expression by labor unions.[37]

### C. *The Rights Guaranteed by the First Amendment Have Been Protected From Much Milder Restraints Than This Statute Imposes*

We have emphasized the fundamental importance to our constitutional system of the rights guaranteed by the First

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[37] See n. 35, pp. 52-53, *supra*.

Amendment and the jealous guardianship which this Court has repeatedly demonstrated for those rights. We have shown that Section 610 [38] imposes a direct restraint on political activity involving many of the rights protected by the First Amendment. This restraint cannot stand in the face of a long line of decisions by this Court.

In a series of cases this Court has given First Amendment rights broad and sure protection. The Court has time after time struck down legislation or other governmental action which it found to threaten preservation of the fullest possible exercise of these rights. Indeed, most of the regulations which this Court has outlawed in its effort to give complete protection to civil rights have been those which only incidentally impaired those rights. If these regulatory and tax impingements on First Amendment rights cannot withstand the Constitution, the outright prohibition which Section 610 entails, and which we have discussed in the preceding subsection, surely cannot stand as valid.

For example in *Grosjean* v. *American Press Co.*, 297 U.S. 233, this Court held unconstitutional a state statute imposing a licensing tax on the privilege of engaging in the business of selling advertising upon the publishers of all newspapers or magazines having a weekly circulation of more than 20,000 copies.

In *Lovell* v. *Griffin*, 303 U.S. 444, 450, 452, this Court held unconstitutional an ordinance prohibiting the distribution of literature without permission from the City Man-

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[38] Our comments on the effect and reach of the statute in this and succeeding sections of the brief are predicated on this Court having ruled, before reaching these constitutional issues, that expenditures for public dissemination of union views on particular candidates are barred by the statute. We shall not trouble the Court by repeating this caveat each time we refer to the statute.

ager. Freedom of speech and freedom of the press, the Court pointed out, "are among the fundamental personal rights and liberties" protected by the Constitution. The Court emphasized, moreover, that:

> "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value'. *Ex Parte Jackson*, 92 U.S. 727."

In *Martin* v. *Struthers*, 319 U.S. 141, this Court held unconstitutional as violative of freedom of speech and freedom of the press a city ordinance making it unlawful for any person distributing handbills and similar literature to ring the doorbell or otherwise summon the inmate of a residence to the door.

In *Thomas* v. *Collins*, 323 U.S. 516, this Court invalidated a state statute requiring paid labor union organizers to register with the Secretary of State and secure an organizer's card before soliciting members within the State.

In *Hague* v. *CIO*, 307 U.S. 496, this Court held invalid a city ordinance requiring a license for the conduct of public meetings.

In *Saia* v. *People of State of New York*, 334 U.S. 558, this Court struck down a New York ordinance forbidding the use of sound amplification devices except by permission of the Chief of Police. The decision stressed (p. 562) that, in balancing community interests, the judiciary should be mindful "to keep the freedoms of the First Amendment in a preferred position".

In *Terminiello* v. *Chicago*, 337 U.S. 1, this Court held unconstitutional a city ordinance construed to prohibit as

disorderly conduct any speech which "stirred people to anger, invited public dispute or brought about conditions of unrest" as an unconstitutional derogation of the civil rights of those who wished to speak even to the point of inviting public dispute.

In *Kunz* v. *New York*, 340 U.S. 290, this Court held "clearly" invalid an ordinance which made it unlawful to hold public worship meetings on the street without first obtaining a permit from the city police commissioner.

In *Niemotko* v. *Maryland*, 340 U.S. 268, this Court held unconstitutional the practice by which permits were issued for public and religious meetings in a park in Havre de Grace, since there were no adequate standards for the issuance of the permits. This resulted in a discriminatory refusal to grant a permit to Jehovah's Witnesses, in violation of their right to equal protection of the laws in the exercise of First Amendment rights.

And recently this Court held invalid a state statute granting a state board the power to refuse to license "sacrilegious" films. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495. See also *Superior Films* v. *Department of Education of Ohio*, 346 U.S. 587.

First Amendment freedoms have thus been protected from legislative restraint by the imposition of taxes, by registration and license requirements, by the regulation of distribution of various kinds of literature and regulation of sound amplification devices, and by censorship. All these restraints, with the possible exception of the last, are milder, less direct and less serious in their implications to free democratic discussion than the outright prohibition imposed by the statute before the Court.

In its various applications of First Amendment protections, this Court has deemed it an indispensable safeguard of free political institutions and democratic political processes to protect from mere Governmental licensing and

regulation the freedom of expression of extremists and dissenters and the like. How much closer then to the protection of those institutions and processes, how much more directly involved is the First Amendment, when Congress totally prohibits the expression of political views in pending elections by all of the great labor unions of the land? In one stroke the primary organized representatives of 20 million laboring men and their families are denied the power of persuasion in the protection of their own interests and that of their members. If the First Amendment is to have any significant and continuing vitality, it cannot protect ineffectual expression of extremist views only to stop short when speech threatens to assert actual influence on political affairs and political power. If organized persuasion at polling time is indeed a political practice that can be banned, then the historic decisions of this Court have served to make the First Amendment not a great bastion which preserves our institutions but merely a haven for socially doubtful and politically ineffective thoughts and expressions.

### D. *No Valid Justification Has Been Offered for the Prohibition of Union Political Expression*

The presumption in favor of rights under the First Amendment requires those who support this statute to justify it by a clear showing of the need for the particular legislation. We believe that the required justification cannot be made.

Congress itself gave little indication of the evils at which it was aiming during the enactment in 1947 of what is now Section 610. The lack of discussion in the hearings and reports prior to the passage of the Labor-Management Relations Act results in there being very little evidence as to the particular dangers which Congress may have felt made this outright prohibition necessary. We turn now

to an examination of the Government's attempted justifications.

1. *"Undue Influence" and "Purity of Elections"*

The Government speaks of the "undue influence" of labor unions in federal elections (*Brief*, p. 52). But no evidence has been or can be adduced to show that labor unions have in fact spent a disproportionately high amount in connection with elections. As we discuss hereafter (see *infra*, pp. 91-98), labor's expenditures run far below its proportionate share based on voting population. Significantly, this very point appears from the Congressional investigations preceding enactment of Section 610, which were relied upon in the debates on Section 610 and by the Government in the court below.

In the reports of the four Congressional committees between 1944 and 1947 which studied union political expenditures there is not a single word nor suggestion of "disproportionate" or "undue" union expenditures or influence.[39] Far from indicating undue influence, the committee reports prior to 1947 actually indicate the contrary. That labor organizations enjoy disproportionately *little* financial influence on federal elections is indicated clearly by the figures compiled and published by the Green Committee. S. Rep. No. 101, 79th Cong., 1st Sess. The Committee tabulated both total expenditures and labor expenditures

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[39] See *Report of Special Committee to Investigate Presidential, Vice-Presidential and Senatorial Campaign Expenditures, 1944* (S. Rep. No. 101, 79th Cong., 1st Sess.); *Report of the Special Committee to Investigate Campaign Expenditures, House of Representatives, 1944* (H. Rep. 2093, 78th Cong., 2d Sess.); *Report of the Special Committee to Investigate Senatorial Campaign Expenditures, 1946* (S. Rep. No. 1, Pt. 2, 80th Cong., 1st Sess.); and *Report of the Special Committee on Campaign Expenditures, 1946, to the House of Representatives* (H. Rep. No. 2739, 79th Cong., 2nd Sess.). Nor was there any suggestion of undue influence in the reports on the bill which became Section 610.

in the 1944 elections.[40] This report (p. 79) shows an expenditure of more than 20 million dollars by Democratic and Republican organizations and committees in the 1944 elections.[41] For the same election the report shows (p. 23) expenditures by the CIO-PAC and the NC-PAC of 1.3 million dollars, to which must be added $250,000 expended by other unions (as indicated in Appendix IV to the Report, pp. 102-121) for a total labor expenditure of 1.6 million dollars.[42] Thus, dividing the total political expenditures at the Federal and State levels by labor's expenditures in 1944 shows that labor organizations, using both union dues and contributions, accounted for only 7% of the total Republican and Democratic expenditures.

Another striking example of labor disadvantage is found in this same report. In the same 1944 election, 242 individuals who represented 64 family groups, made direct contributions totalling $1,277,121. Green Report, *supra*, Appendix VIII (pp. 140-151). Thus expenditures on behalf of many millions of workers only slightly exceeded contributions made by 64 families.

Not only does the argument of disproportion or undue

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[40] It should be noted that it was in the 1944 campaign that labor made its greatest expenditures to that date (see p. 102, *infra*).

[41] The actual figure indicated as spent, at page 79 of the report, is $20,633,177. However, as the report indicates, this total excludes the bulk of expenditures by local and county organizations and also omits expenditures for candidates for the House of Representatives. See also Overacker, *Presidential Campaign Funds, 1944*, in 39 American Political Science Review 899 (1945).

[42] The actual total is $1,580,257.10. Of this sum, $252,481.18 was expended by other unions as indicated in Appendix IV. The expenditures, tabulated at page 23, are as follows:

| | |
|---|---|
| Expenditure from Union Contribution to CIO-PAC | $ 478,499.82 |
| Expenditure from Individual Contributions to CIO-PAC | 470,852.32 |
| Expenditure by NC-PAC | 378,424.78 |
| Total | $1,327,775.92 |

Cf. *Regulation of Labor's Political Contributions and Expenditures: The British and American Experience*, 19 University of Chicago Law Review 371, n. 28, n. 106.

influence find no basis in the legislative history preceding enactment of Section 610, but the foregoing figures indicate how little labor unions spent in proportion to their numbers prior to the enactment of Section 610. There is no showing, either legislative or otherwise, nor can there be, that labor unions were ever in a position to exercise disproportionate or undue influence on federal elections. On the contrary, labor's political expenditures run far below its proportionate share based on voting population. This less than proportionate, rather than excessive, participation is hardly an evil requiring correction by a complete prohibition of labor union political activity. Indeed, true respect for our fundamental democratic processes would seem to require that labor union participation in political processes be encouraged rather than restricted.

Perhaps nothing attests more effectively to the weakness of the undue influence contention than the Government's dropping of the argument made on this point in the court below and its bare passing reference to the contention here.[43] In its place, the Government now shifts to an argument based on the protection of the "purity of elections," an argument not previously offered as now made in any of the four prosecutions under Section 610 and one which, as far as we are aware and as far as anything in the Government's brief indicates, is nowhere contained in the legislative history.

We are somewhat at a loss to answer the Government's argument on purity of elections for it is less an argument than a potpourri of disparate considerations. In so far as the Government is concerned with the "unwilling participants" (*Brief*, p. 53) in the union's activities, we deal with this contention in our answer to the Government's argument on "minority protection" (see pp. 64-70, *infra*). In so far as the Government is concerned that political expenditures

[43] See *Brief for the United States*, p. 52.

by unions "deprive the elective process of that individualism which is a necessity of democratic government" (*Brief*, p. 56), we suggest that, if this statement adds anything to the minority protection argument, it only indicates the acceptance by the Government of that very concept of atomization which Mr. Justice Rutledge so well answered in his concurring opinion in the *CIO* case. 335 U.S. at p. 147. In so far as the Government is concerned (*Brief*, p. 54) with the fact that "the public is never adequately apprised as to the actual constituent voting strength of the entity," certainly a disclosure statute, rather than a prohibition statute, would be the only constitutionally-appropriate remedy. *Cf. United States* v. *Harriss*, 347 U.S. 612. In so far as the Government is concerned with the political activities of an "artificial entity", the contention appears to be a holdover from the argument below analogizing corporations and labor unions. But whatever may be the legal situation with respect to corporate political action, the differences in labor union political activity are readily apparent.[44] Finally, in so far as the Government is concerned with the "reciprocal obligations of the political candidates" (*Brief*, p. 55), this adds little, if anything, to the undue influence argument already answered; furthermore, no instances in connection with unions where elections have been rendered impure, where fraud or corruption have resulted or where improper use of expenditures has been made, were before Congress when it passed Section 610.

Neither the undue influence contention nor the purity of elections contention, standing alone or taken together, support the prohibition on the expression of union views.

### 2. *Minority Protection*

The burden of the Government's argument in justification

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[44] See n. 74, p. 100, *infra*.

of Section 610 rests on the view that the statute was aimed at the possibility that there might be a minority of union members who objected to support of particular candidates and whose funds, in the form of union dues, were misused for such support. This conclusion, too, fails as a support for the statute.

All labor union activity is group activity, and the right of workers to participate in such group activity has been recognized in every quarter.

In *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, it was said (at p. 439):

> "Society itself is an organization and does not object to organization for social, religious, business and all legal purposes. The law, therefore, recognizes the right of working men to unite and invite others to join their ranks, thereby making available the strength, influence, and power that come from such association."

And again in upholding the validity of the National Labor Relations Act, this Court said (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33, 34):

> "That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents . . . Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it."

Labor unions are associations of individuals operating on the principle of majority rule. This Court has said of that principle that it is "a rule that 'is sanctioned by our Governmental practices, by business procedure, and by the whole philosophy of democratic institutions'." *N. L. R. B.* v. *A. J. Tower Co.*, 329 U.S. 324, 331. The principle has been

upheld even where, unlike the instant case, the rule of the majority is imposed by governmental action rather than the voluntary act of the individual. See, e.g., *J. I. Case Co.* v. *N. L. R. B.*, 321 U.S. 332.[45]

In recent years the need for labor's participation in politics has been accentuated by the increased extent to which actions of government affect the economic life of all segments of the population. The same considerations which underlay the trade union movement, those realities which required helpless individuals to take concerted action against the powerful employer, require the individual in politics to associate with others in order to achieve that representation and promote those political views which in turn protect his economic interests. The other interests in our national life, as we point out more fully in Point V of this brief, are organized in strength. Union members must act politically with their organized strength to insure that their views will receive an adequate hearing from the public and from those who make legislative and executive policy.

This authorized and traditional political activity by unions affords the answer to the contention that minority members of the union need protection against use of their dues for political purposes. Labor organizations have for many years been an important element in the political

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[45] The Government's reliance upon *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, and the cases following it, is misplaced. In those cases the majority, in collective bargaining, sought to give the seniority rights of the minority to the members of the majority. Here the majority seeks, by political action, to protect the rights of all members of the union. The fact that a minority may disagree with the majority action is hardly the equivalent of the deliberate discrimination against the minority in the cases relied upon. Indeed, it is clear that the minority right protected in *Steele* and the succeeding cases is merely the right to have the majority *fairly* represent the entire group. Those cases are an affirmance rather than a denial of the principle of majority rule.

scene. Appellee has taken an active part in elections since its formation. Its Constitution has authorized that activity. Like all other activities of the union, it is a group activity governed by the majority rule principle. That principle, as the district court in *United States* v. *CIO*, 77 F. Supp. 355, pointed out (p. 358), "is recognized in the very statute of which the Labor-Management Relations Act containing this Section 304 is an amendment". That principle governs all of American life; community and group activity by their very nature are based on majority rule.

Every action taken by a labor union requires that individual dissenting views be subordinated to group views. This is true with respect to all aspects of collective bargaining decisions. This is true with respect to all aspects of legislative decisions. Certainly majority rule is no less appropriate to decisions having to do with the expenditure of union funds in the political arena, where majority rule is the essence of the electoral process.

In *DeMille* v. *American Federation of Radio Artists*, 31 Cal. 2d 137, 187 Pac. 2d 769, *cert denied*, 333 U.S. 876, the Supreme Court of California applied this majority rule principle to the closely-related legislative use of labor union funds. There the court pointed out that (at p. 150):

> "Majority rule necessarily prevails in all constitutional government. . . . In a government based on democratic principles the benefit as perceived by the majority prevails . . . the principles involved and applicable to the facts are not new. Here novelty is present only in the assertion that the proper use of association funds may be avoided by a member who is committed to a minority view. Other organizations, such as medical associations, bar associations, and the like, have used their funds to support favorable legislation or defeat measures considered in the opinion of the majority or its duly authorized representatives to

be inimical to the public interest or to its own welfare. It has never been considered that a difference of opinion within the association as to the use of association funds for such purposes, where otherwise lawful, was a matter for judicial interference."

Nor would there appear to be any reason to distinguish majority rule in the field of legislative activity from majority rule in the field of political activity. In the case of union political activity, union efforts are directed at electing persons pledged specifically or generally to certain legislative objectives. In the case of union legislative activity, union efforts are directed at persuading persons already elected to enact or oppose these same pieces of legislation. If minority protection justifies prohibiting the union's expression of views on candidates, it would seem equally to justify prohibiting the expression of its views on legislation. And, by the same token, if minority protection fails to justify prohibition of the union's expression of its views on legislation, it could no more justify the prohibition of the expression of its views on candidates pledged to carry out or oppose such legislation.

Thus, the justification for the prohibition on collective action which is tendered here must fail; for in a great democratic union of states it cannot well be argued that a basic evil inheres in great democratic unions of working men. The only political system which preserves the untrammeled right to dissent for which the Government argues is anarchy. The price of the unanimity rule in political systems, just as in group political advocacy, is total impotence. The price which the Government levies for the "freedom" of union members from being bound by group decision in matters of political advocacy is the removal of union power to protect the interests of its members by public persuasion in the political arena.

But appellee is not required to defend the principle of

majority rule in this case. *The even simpler answer to the Government's contention is that Section 610 is not directed at the protection of the minority, for it applies whether or not there is any minority and whether or not that minority is willing to allow the majority decision to be implemented.* Indeed it is not clear whether the minority which the Government seeks to protect consists of persons who would have chosen a different candidate but are content to allow the majority decision to be implemented or consists of persons who not only oppose the choice of a candidate but also oppose the implementation of the majority decision. Whatever the Government's position may be, the statute fails to make any such distinctions or in any way to deal with the problem of minority protection.

The statute applies even where the expenditures are made by unanimous decision of the union membership. The statute applies even where, though some members might have a different choice of candidates, all members support the union in implementing the majority decision.[46] The statute applies in areas where the union shop does not exist or where, if the union shop does exist, all workers belonged to the union prior to the inauguration of the union shop or subsequently joined without reference to the union shop.[47]

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[46] Minorities are not fixed but fluid. A union member may oppose one candidate supported by his union and strongly champion another. Because, in the long run, the group represents his own interests, the member may very well be prepared to see the majority act even though in a particular instance he would have acted differently. There is no allegation in the indictment that all members of appellee union do not support the union in implementing the majority decision.

[47] From August 1947 to October 1951 the Labor-Management Relations Act required the affirmative vote of the majority of workers both union and non-union before a union shop provision could be negotiated with the employer. During these years the NLRB conducted 46,119 authorization polls of which 44,795, or 97.1 percent, resulted in authorization. Of the more than 5½ million votes cast on this issue, over 5 million—*91 percent of those voting*—chose to have a union shop. The complete tabulation appears in the *Sixteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1951,* Appendix B, Table 9A, p. 301, entitled "Results of union-shop authorization polls conducted Aug. 22, 1947-Oct. 22, 1951".

Finally, the statute applies even where the union allows dissenting members to contract out from the fund supporting the expression of union political views.[48]

It is thus clear that, aside from the fact that there is nothing improper in a minority of union members being bound by the decision of the majority, Section 610 is not directed at the protection of the minority.[49] It is neither addressed nor limited to the protection of any actual minorities, but rather prohibits all group action. Neither its context nor the debate prior to its enactment warrants the suggestion that the statute is anything less than a broadside assault on the freedom of political expression guaranteed by the First Amendment.

E. *The Statute Is Not Restricted to the Elimination of the "Evils" Offered As Justification For Prohibiting Union Political Advocacy*

Section 610 completely fails to meet the test which has been established for legislation impinging on First Amendment rights, that the statute must be narrowly drawn to deal with the precise evil which the legislature is seeking to curb. *Joseph Burstyn, Inc.* v. *Wilson, supra,* at p. 504; *Wieman* v. *Updegraff,* 344 U.S. 183, 190-191; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Schneider* v. *State of New Jersey, supra; De*

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[48] This is now the case in appellee union. Under the UAW Constitution, 5 cents of each member's monthly dues goes into a Local Union Citizenship Fund and 5 cents goes to the Citizenship Fund maintained by the International Union. It is these citizenship funds which are utilized to express the union's views on political candidates. Recently the UAW International Executive Board voted to allow any member so desiring the right to have the portions of his dues earmarked for Local Union and International Union Citizenship Funds diverted to a non-partisan organization such as the American Heritage Fund devoted to promoting greater citizenship activity. See *United Automobile Worker,* August, 1956.

[49] It is this consideration which distinguishes the legal limitations placed on union political expenditures by Great Britain, New South Wales and Western Australia relied upon by the Government (*Brief,* p. 62).

*Jonge* v. *Oregon, supra.* Recently this Court has applied that principle and upheld a regulatory statute affecting First Amendment rights only after restricting it by a limited interpretation contrary to that proposed by the Government. *United States* v. *Harriss,* 347 U.S. 612. In ruling on the validity of the Lobbying Act as an exercise of the power to maintain the integrity of basic governmental processes, this Court upheld the Act only as restricted by its interpretation to those who actually solicited or received contributions for the purpose of directly communicating with Congress. It indicated that it would not have so held if the statute had been interpreted to conform literally with its broader language to include all who made expenditures to influence Congress. The statute as interpreted was held constitutional only because "Congress has used . . . power in a manner restricted to its appropriate end" (at p. 626). The "manner" which Congress had chosen to meet the evil of lobbying was registration and publicity, not complete prohibition; yet this Court found it necessary to limit by interpretation the effect of that regulation because of possible impairment of freedom of speech and of the right to petition Congress.

It seems clear that the broadside interdiction of political activity which Section 610 imposes cannot be said to be the "appropriate" manner in which to deal with the supposed evil of labor's political activity. If the evils at which Section 610 is aimed are those which the Government has suggested—undue influence of labor unions, impurity of elections, and disregard of minorities in the union—this legislation on its face is not sufficiently narrowly drawn. It prohibits irrespective of the presence or absence of such "evils"; it does not regulate.

The comment of this Court in another case involving the

failure of the legislative body to limit the restriction of freedom to specific abuses is particularly appropriate here. In *De Jonge* v. *Oregon, supra,* at pp. 364, 365 the Court said:

> "The people through their legislatures may protect themselves against . . . abuse [of free speech or press]. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." [50]

### F. *The Proscribed Conduct Is Not Clearly Defined*

The final test which this Court has evolved in its scrutiny of statutes in the area of First Amendment rights is that the conduct which is sought to be eliminated must be sufficiently definitely described so that the statute does not jeopardize the free exercise of rights outside the area of permissible or intended restraint and so that it will prevent the possibility of discrimination in enforcement which an unclear statute might involve. *Winters* v. *New York,* 333 U.S. 507, 509-10; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Thornhill* v. *Alabama,* 310 U.S. 88; *Herndon* v. *Lowry,* 301 U.S. 242; *Stromberg* v. *California,* 283 U.S. 359. As fully discussed in Point VI, *infra,* pp. 104-110, the limits of the present statute are so vague as to be unascertainable.

Where a statute involving the fundamental right of political expression is involved, its vagueness may result in far more harm than in the case of an ordinary criminal statute. Two evils result from the vagueness: (a) the exercise of political rights which may actually be outside the statute is effectively restrained and (b) there is an opportunity for

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[50] Neither this Court nor appellee has the obligation to suggest the outlines of permissible legislative action in this highly sensitive field. Congress made no attempt to limit the provisions of Section 610 to any evils, real or fancied, simply laying down the rule, in Senator Taft's words, that "labor unions are supposed to keep out of politics" (93 Cong. Rec. 6440). Having failed to limit the statute and having gone beyond regulation and into prohibition, Congress exceeded permissible limitations on First Amendment rights.

discrimination in enforcement, which we think is best illustrated by the fact that no case involving allegations of unlawful "expenditures" has ever been brought against a corporation.

This Court has expressed its awareness of the possible results of vagueness in a statute involving the exercise of free political discussion. In *Stromberg* v. *California, supra* (at p. 369), the Court stated:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the Fourteenth Amendment."

And in *Jones* v. *Opelika,* 316 U. S. 584, [51] the Court recognized the other possible evil result of the vagueness of the statute in that it provided an opportunity for discriminatory and unfair application. The Court noted that the record showed that the license fee imposed by the statute in that case had been required of members of Jehovah's Witnesses but not of other ministers and stated at page 617:

> "We need not shut our eyes to the possibility that use may again be made of such taxes, either by discrimination in enforcement or otherwise, to suppress the unpalatable views of militant minorities such as Jehovah's Witnesses . . . As the evidence excluded in No.

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[51] The dissenting opinions were later adopted by the majority in 319 U.S. 103.

280 tended to show, no attempt was there made to apply the ordinance to ministers functioning in a more orthodox manner than petitioner."

See also *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-5.

The interpretations of Section 610 by the courts in the cases which have arisen under it have hardly served to render the statute less vague, and cannot be relied on in any sense as clarification. The process of exclusion by individual cases has left labor unions with no clear definition of their rights to participate in political activities. They have no opportunity to express their views on candidates except by running the risk of prosecution under a statute lacking in ascertainable standards marking the line between permitted and forbidden expression of union views.

### G. *Cases Arising Under This and Similar Statutes Have Held Such Statutes to Be Unlawful Abridgments of First Amendment Freedoms*

In summary, Section 610 not only violates guiding principles which have been developed to insure the continued vitality of the First Amendment, but also runs afoul of the decided cases under this and similar statutes.

The Supreme Judicial Court of Massachusetts has unanimously declared, in an advisory opinion, that a proposed state statute [52] strikingly similar to Section 610 was incon-

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[52] The proposed law provided:

"*No corporation* carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, or any company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth, no officer or agent acting in behalf of any corporation men-

sistent with the rights of freedom of the press, freedom of speech and peaceable assembly. *Bowe* v. *Secretary of the Commonwealth,* 320 Mass. 230, 69 N. E. (2d) 115.

The opinion of the courts is precisely applicable to this case:

> "The liberty of the press is enjoyed, not only by individuals, but also by associations of individuals such as labor unions (*Hague* v. *Committee for Industrial Organization,* 307 U. S. 496) and even by corporations, although a corporation is not a 'citizen' and must find its protection against abridgement of its liberty by State action in the due process clause rather than the privileges and immunities clause of the Fourteenth Amendment. *Grosjean* v. *American Press Co., Inc.,* 297 U. S. 233, 243, 244. Compare *Western Turf Association* v. *Greenberg,* 204 U. S. 359, 363; *Hague* v. *CIO,* 307 U. S. 496, 527, and for an appreciation of the divergence in the authorities, *Independent Service Corp.* v. *Tousant* (Dist. Mass.), 56 Fed. Sup. 75, 78. See also Rutledge, J., in *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 404.
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> "One of the chief reasons for freedom of the press is to insure freedom, on the part of individuals and associations of individuals at least, of political discussion of men and measures, in order that the electorate at the polls may express the genuine and informed will of the people. Brandeis, J., in *Whitney* v. *California,* 274 U. S. 357, 375; Hughes, C. J., in *Stromberg* v. *California,* 283 U. S. 359, 369. *Individuals seldom*

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tioned in this section, and *no labor union,* or any person acting in behalf thereof *shall directly or indirectly give, pay, expend or contribute, any money or other valuable thing in order to aid, promote or prevent the nomination or election of any person to public office, or to aid, promote or antagonize the interests of any political party, or to influence or affect the vote on any question submitted to the voters.*" (Emphasis added.)

***impress their views upon the electorate without organization. They have a right to organize into parties, and even into what are called 'pressure groups' for the purpose of advancing causes in which they believe.*** They have a right to engage in printing and circulating their views, and in advocating their causes in public assemblies and over the radio. All this costs money, and if all use of money were to be denied them the result would be to abridge even to the vanishing point any effective freedom of speech, liberty of the press, and right of peaceable assembly.

"It remains to apply these principles to the proposed law under discussion. *We do not doubt that labor unions, like individuals, may be curbed by corrupt practices acts and prevented from dumping immense sums of money into political campaigns. But under the proposed law the political activities of labor unions are not regulated or curbed but are substantially destroyed. Deprived of the right to pay any sum of money for the rental of a hall in which to hold a public rally or debate, or for printing or circulating pamphlets, or for advertising in newspapers, or for buying radio time, a union could not carry on any substantial and effective political activity. It could not get its message to the electorate. Its rights of freedom of the press and of peaceable assembly would be crippled* . . ." (Emphasis added.)

In holding that this very statute, Section 610, is unconstitutional, the district court, in *United States* v. *CIO*, 77 F. Supp. 355, in its unreversed judgment dismissing the indictment, said (at p. 357):

"I am of opinion that the questioned portion of Section 304 of the Act is an unconstitutional abridgment

> of freedom of speech, freedom of the press and freedom of assembly. At no time are these rights so vital as when they are exercised during, preceding or following an election. If they were permitted only at times when they could have no effect in influencing public opinion, and denied at the very time and in relation to the very matters that are calculated to give the rights value, they would lose that precious character with which they have been clothed from the beginning of our national life."

On the direct appeal from this judgment, the majority of this Court entertained "the gravest doubt" (*United States* v. *CIO, supra,* at p. 121) of the constitutionality of the statute if construed broadly.[53] Four Justices of this Court, unable to go along with the majority's restrictive interpretation avoiding the constitutional issues, thoroughly analyzed those issues in an opinion by Mr. Justice Rutledge and held that the statute was clearly unconstitutional.

The opinion discussed each one of the constitutional principles which have been treated in this Point III and upheld appellee's contentions in each instance.

The same fundamental view that First Amendment rights are of the highest importance in connection with the electoral process moved the four concurring Justices. They said (p. 143-144):

> "The expression of bloc sentiment is and always has been an integral part of our democratic electoral

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[53] The Court of Appeals for the Second Circuit in the *Painters Local* case entertained these same doubts, adding that, in view of the Supreme Court decision, the constitutional question was no longer "one of first impression." 172 F. 2d at p. 857. Likewise, the district court in the *General Laborers'* case, *supra,* was troubled by the constitutional problems raised by a broad interpretation of the statute.

and legislative processes. They could hardly go on without it. Moreover, to an extent not necessary now to attempt delimiting, that right is secured by the guaranty of freedom of assembly, a liberty essentially coordinate with the freedoms of speech, the press, and conscience. *Cf. Bowe* v. *Secretary of the Commonwealth,* 320 Mass. 230, 251, 252, 69 N.E. 2d 115. It is not by accident, it is by explicit design, as was said in *Thomas* v. *Collins, supra,* 323 U.S. at page 530, that these freedoms are coupled together in the First Amendment's assurance. They involve the right to hear as well as to speak, and any restriction upon either attenuates both. . . . The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function."

The Justices viewed the statute as a complete prohibition and direct restraint (p. 146):

"Here the restriction in practical effect is prohibition, not regulation, when it is considered with respect to the objects of suppressing corruption and 'undue influence.' It is not a limitation, it is a prohibition upon expenditure of union funds in connection with a federal election. Unions can act and speak today only by spending money, as indeed is true of nearly every organization and even of individuals if their action is to be effective."

This complete prohibition in the area of First Amendment rights, the opinion pointed out, must be justified by its proponents (pp. 144-45):

> "It is this very difference, of course, which brings into play the First Amendment's prohibitions and the principles giving them presumptive weight against intrusions or encroachments upon the area the Amendment reserves against legislative annexation. It is this difference, the very fact that the restriction seeks to contract the boundaries of expression and the right to hear previously considered open, which forces upon its authors the burden of justifying the contraction by demonstrating indubitable public advantage arising from the restriction outweighing all disadvantages, thus reversing the direction of presumptive weight in other cases."

But, the opinion went on, that justification had not been made with respect to either of the alleged evils, either that of undue influence or of minority dissent.

With respect to the first alleged evil, Mr. Justice Rutledge stated (p. 145):

> "If therefore it is an evil for organized groups to have unrestricted freedom to make expenditures for directly and openly publicizing their political views and information supporting them, but *cf. Bowe* v. *Secretary of the Commonwealth, supra,* 320 Mass. at page 252, 69 N. E. 2d at page 130, it does not follow that it is one which requires complete prohibition of the right. Ibid. That is neither consistent with the Amendment's spirit and purpose, ibid., nor essential to correction of the evil, whether it be considered corruptive influence or merely influence of undue or disproportionate political weight."

The opinion also stressed that, as to the second alleged evil of minority dissent, the statute (p. 149):

> ". . . rests upon the presumption that the majority are out of accord with their elected officials in political

viewpoint and its expression and, where that presumption is not applicable, it casts the burden of ascertaining minority or indivdual dissent not upon the dissenters but upon the union and its officials. The former situation may arise, indeed in one notable instance has done so. But that instance hardly can be taken to be a normal or usual case. Unions too must often operate under the electoral process and the principle of majority rule. Nor in the latter situation does it seem reasonable to presume dissent from mere absence of explicit assent, especially in view of long-established union practice."

Lastly, the opinion concluded that the statute failed to meet the test of the corollary principles which the Court had developed in connection with statutory restrictions on First Amendment freedoms (pp. 141-142):

"Apart from the question whether the same argument might not be applicable to all other powers granted to Congress by the Constitution, to destroy the principles stated for securing the preferential status of the First Amendment freedoms, the argument ignores other equally settled corollary principles. These are that statutes restrictive of or purporting to place limits to those freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb, *Cantwell* v. *Connecticut*, 310 U.S. 296; *Thornhill* v. *Alabama*, 310 U.S. 88; *Schneider* v. *State*, 308 U.S. 147; *De Jonge* v. *Oregon*, 299 U.S. 353; *Saia* v. *New York*, 334 U.S. 558; and that the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation. Blurred sign-posts to criminality will not suf-

fice to create it. *Cantwell* v. *Connecticut, supra; Stromberg* v. *California,* 283 U.S. 359; *cf. Thomas* v. *Collins,* 323 U.S. 516; *Winters* v. *New York,* 333 U.S. 507.

"Section 313 falls far short of meeting these requirements, both in its terms and as infused with meaning from the legislative history. This is true whether the section is considered in relation to one or another of the evils said to be its targets or with reference to all of them taken together."

We submit that Section 610 is invalid. A similar state statute has been held invalid by the highest court of Massachusetts, grave doubts of the statute's constitutionality have been expressed by this Court, and four concurring Justices of this Court have expressly held that the statute impairs civil rights in violation of the First Amendment. We respectfully submit that Section 610 unlawfully abridges appellee's rights and the rights of its members under the First Amendment.

## IV

### Section 610 Unlawfully Abridges the Right of Appellee and Its Members to Choose Congressional Representatives, Guaranteed by Article I, Section 2, of and the Seventeenth Amendment to the Constitution

If this Court should reach this constitutional point, it will of necessity have decided that the trade union activity prohibited by the statute is virtually all union activity directly related to the outcome of federal elections. Such a blanket prohibition unlawfully abridges the constitutional right of appellee and its members to choose their Congressional representatives.

The provisions of Article I, Section 2, and of the Seventeenth Amendment to the Constitution specifically confirm

the right of the people to elect Congressmen and Senators. Article I, Section 2, provides that "the House of Representatives shall be composed of members chosen . . . by the people of the several states." By the Seventeenth Amendment it was provided that "the Senate . . . shall be composed of two Senators from each State, elected by the people thereof." This right of the people to choose their congressional representatives is thus firmly established as a federal constitutional right; by virtue of these constitutional provisions, although the qualifications of voters are determined by the states, the right of qualified voters to choose their congressional representatives is given federal constitutional protection. *Ex Parte Yarborough*, 110 U. S. 651; *Wiley* v. *Sinkler*, 179 U. S. 58; *Swafford* v. *Templeton*, 185 U. S. 487; *United States* v. *Mosely*, 238 U. S. 383; *United States* v. *Classic*, 313 U. S. 299; *United States* v. *Saylor*, 322 U. S. 385; *Smith* v. *Allwright*, 321 U. S. 649. The authoritative statement of this principle was made by Mr. Justice Stone, writing for the majority in *United States* v. *Classic* (313 U. S. at p. 314):

> "Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."

The record of the adoption and the ratification of the Constitution fully supports the conclusion of this Court, as stated in *United States* v. *Classic, supra*, at page 316, that "the free choice by the people of representatives in Congress . . . was one of the great purposes of our constitutional scheme of Government. . . " The principle of popul..

election of the House of Representatives was debated at several points by the Constitutional Convention and consistently prevailed (II Elliot, *Debates at the Federal Convention,* pp. 136 *et seq.,* 160 *et seq.,* 223 *et seq.*). Madison considered popular election "as essential to every plan of free government" (*id.* at 137), and the primary importance of popular election of the House was emphasized to the voters considering ratification of the proposed Constitution in many issues of the Federalist papers (See Nos. 47, 52, 53, 55 and 57). Choice by the people was pointed to as the safeguard against tyranny and treachery by the Congress (No. 55).

With the adoption of the Seventeenth Amendment, the election of Senators became an equal organ with the election of members of the House for the expression of the free choice of the people.

The scope of the electoral rights created by the Constitution has been indicated in a series of cases, determining the extent of federal power to protect the electoral process. These cases arose under the Civil Rights statutes, which provide remedies for private or governmental action impairing constitutionally secured rights (18 U.S.C. §§ 241, 242; 42 U. S. C. §§ 1981, 1983). The decisions recognize federal power, under Article I, Section 4, to *protect* rights arising from Article I, Section 2. Beginning with *Ex Parte Yarborough, supra,* the courts have held the following to be attributes of the right to vote which Congress may protect, either by application of criminal sanctions or provision for civil relief:

> (i) The right to vote, either in a general election or in a primary which is an integral part of the electoral process (*Ex Parte Yarborough, supra; Wiley* v. *Sinkler, supra; Swafford* v. *Templeton, supra; Smith* v. *Allwright, supra*).

(ii) The right to have the force of the vote protected against ballot stuffing (*United States* v. *Saylor*, 322 U.S. 385; *Ledford* v. *United States*, 155 F. 2d 574 (CA 6) *cert. denied*, 329 U.S. 733) or against the votes of unqualified voters (*United States* v. *Wilson*, 72 F. Supp. 812 (W.D. Mo.)).

(iii) The right of a qualified voter to register (*United States* v. *Ellis*, 43 F. Supp. 321 (D.S.C.)).

(iv) The right to sit on an election board, or to act as judge, inspector or poll clerk at an election for Congressman or Senator (*United States* v. *Aczel*, 219 Fed. 917 (D. Ind.)).

Thus the courts have recognized that the constitutional right to choose is not an empty phrase, but a guaranty of the right of "effective choice" (*United States* v. *Classic*, *supra*, at p. 314). The constitutional right of a qualified voter to make an effective choice of Congressional representatives requires more than mere protection of the mechanics of the casting and counting of ballots; it requires group political action.

Section 610 establishes a most dangerous departure from the American tradition of group political activity. As Mr. Justice Rutledge stated with respect to Section 610 in the *CIO* case, *supra*, at p. 147, "the accepted principle of majority rule which has become a bulwark, indeed perhaps the leading characteristic, of collective activities is rejected in favor of atomized individual rule and action in matters of political advocacy...." Manifestly, a nation of 160 million people cannot maintain effective democratic government if every individual voter must act alone. It is only through association in groups in which the individual accepts the principle of majority rule that he can further his general economic interests and hope to achieve any political effectiveness in our complex modern society. As the Massachusetts court

observed in the *Bowe* case, *supra*, effective election rights must include the right of persons "to organize into parties, and even into what are called 'pressure groups' for the purpose of advancing causes in which they believe" for "individuals seldom impress their views upon the electorate without organization."

It has always been recognized that in joining political parties or groups and associations which engage in political activity, the dues and contributions of the member must often go to support individual candidates to whom the member in question is opposed. For instance, a southern contributor to the National Democratic Party might vigorously oppose the expenditure of part of his contribution to support liberal northern candidates while an isolationist contributor to the Republican Party might object to the use of his contribution for the support of candidates who endorse the Eisenhower-Dulles foreign policy. But the individual who joins such a group discounts this evil because he believes that the overall group purposes further his own interests. This group political activity is an American political tradition which antedates the Constitution itself. Section 610 abandons the system of majority rule and group activity and necessitates "atomized" and ineffective methods of political advocacy.

It is submitted that our tradition of group political activity embodies a fundamental constitutional right. It is too late for Congress to attempt to rewrite the political history of the United States by trying to pattern American elections along individual, atomized lines. As Mr. Justice Black stated in the *United Public Workers* case:

> "Legislation which muzzles several million citizens threatens popular government, not only because it injures the individuals muzzled, but also, because of its harmful effect on the body politic in depriving it of the

political participation and interest of such a large segment of our citizens. . . . I think the Constitution prohibits legislation which prevents millions of citizens from contributing their arguments, complaints, and suggestions to the political debates which are the essence of our democracy; prevents them from engaging in organizational activity to urge others to vote and to take an interest in political affairs. . . . Such drastic limitations on the right of all the people to express political opinions and take political action . . . would violate, or come dangerously close to violating, Article I and the Seventeenth Amendment of the Constitution, which protect the right of the people to vote for their Congressmen and their United States Senators and to have their votes counted. . . ." (330 U. S. 75, 111).[54]

Section 610, as here interpreted, prohibits traditional group political activity at election time in all its aspects. Expenditures may well be barred for urging full participa-

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[54] These words were written in the dissenting opinion in *United Public Workers* v. *Mitchell*, 330 U.S. 75, where the majority upheld certain Hatch Act prohibitions of political activity by federal employees. But the majority opinion, far from rejecting the quoted language, accepted Mr. Justice Black's premise that the statute invaded areas of traditional political freedoms. The Court stated at pp. 94-95, "we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments." However, the Court went on to uphold the prohibitions on campaign activities as an exercise of federal power to preserve the efficiency of the public service.

Furthermore, the Hatch Act safeguards the very right denied by Section 610. It provides *"all such persons shall retain the right to . . . express their opinions on all political subjects and candidates."* 5 U.S.C. 118 i(a). And in *Mitchell, supra* at 94, the conduct this Court held prohibitable was not expression of political views but the circumstance that a federal employee "was a ward executive committeeman of a political party and was politically active on election day as a worker at the polls and a paymaster for services of other party workers." The presently pertinent infirmity of Section 610 is its failure to make the vital differentiation specifically embodied in the Hatch Act.

tion in federal elections, for educating union members and the public in voting procedures, for transporting members and the public to the polls and for investigating and publicizing election abuses and irregularities at the polls. Union officials may not take even the direct steps of protecting the integrity of the electoral processes by watching at the polls, if they do so while on union salary or in any official capacity. Thus, the whole series of practical political activities which would help to insure that the choice by union members of their Congressional representatives be effective is prevented by this reading of the statute. Section 610 abandons that effective group political action which has been at the foundation of the political history of this country.

We submit that Congressional power to guard the free exercise of the civil rights of voters cannot be converted into Congressional power substantially to destroy or impair them. Yet, this is the immediate effect of this statute on the freedom of working men and women to protect their interests as union members. It deprives union members of their primary organized means of protection of their interests in many of the most important political issues of the day.

Millions of working men and women who have laboriously built up their union over a period of many years for the purpose, among others, of political activity have been forced to discard their only effective means of political action. The statute thus directly restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, referred to by Mr. Justice Stone in *United States* v. *Carolene Products Co.*, 304 U. S. 144, n. 4, and which must be given the widest possible scope in order to preserve truly democratic government.

## V

## The Prohibition of Union Expenditures in Connection With a Federal Election Is an Arbitrary Discrimination Which Deprives Unions and Their Members of Liberty Without the Due Process of Law Guaranteed by the Fifth Amendment

With the sole exception of the prohibition on labor union election expenditures, Congress has never enjoined associations of individuals formed to promote common interests from expending funds in federal elections.[55] Associations

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[55] Of course, the statute is applicable to corporations. However, all apart from the fact that a corporate ban cannot be utilized to justify a ban on trade unions (see n. 74, p. 100, *infra*), the startling fact is that the prohibition on corporate expenditures has never been enforced and is in fact unenforceable. As stated by one authority, the "only part of American corrupt practices acts that anyone makes a show of enforcing is that relating to union contributions." Key, *Southern Politics*, 480 (1949). Individual gifts by corporate officials and their families are a simple method of avoidance of the prohibition, for the laws requiring reporting of expenditures and contributions are not adequate to identify such individual contributions with the corporate interests they reflect. See Overacker, *Presidential Campaign Funds*, 69 (1946). A recent survey of the subject, *How to Give Money to Politicians* by Duncan Norton-Taylor, *Fortune*, May 1956, p. 113, 238, states that "corporations just duck around" the law:

> "They cover up contributions by listing them in various expense accounts. The boss's secretary appears as the purchaser of blocks of tickets to $100-plate dinners. Executives contribute handsomely to campaign chests with the understanding that they will get their money back in bonuses."

See also McKean, *Party and Pressure Politics*, 352-353 (1949); Merriam and Gosnell, *The American Party System*, 406-407 (1949). Furthermore, "public interest" advertisements have become a favorite method for corporate tax deductible aid to candidates by means such as the paraphrasing of a candidate's speeches or slogans. See, for instance, 239 *Printers Ink* No. 2, p. 17 (Apr. 11, 1952); Advertisement, *New York Times*, Oct. 15, 1952, p. 21 by Standard Steel Spring Company. Tax deductible corporate contributions are often accomplished through "good will" advertisements in party journals and publications at some county or state committee dinner.

Despite these widespread practices there has never been a single indictment for violation of the corporate expenditure prohibition.

of farmers, doctors, lawyers and others are left free to spend general funds in federal elections. The same is true of employer, manufacturer and business groups such as Chambers of Commerce or the National Association of Manufacturers. Beyond those groups, countless numbers of veterans', fraternal, educational, public service, and community associations and the like are left free to spend general funds in elections. The statute thus singles out unions while all other unincorporated associations are left unrestricted.[56]

A. *Discriminatory Laws Violate Due Process Guaranties*

Those who wrote our Bill of Rights were acutely aware of the need for a constitutional guarantee against discriminatory legislation for they had recently suffered under arbitrary, punitive laws. The due process guarantee of the Fifth Amendment therefore prohibits arbitrary and discriminatory governmental action. This Court, in *Hurtado* v. *California*, 110 U.S. 516, 535-6, gave great emphasis to this historic safeguard. In the course of a comprehensive examination of due process guaranties the Court declared:

> ". . . every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society, and thus, excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar *special, partial and arbitrary exertions of power* under the forms of legislation." (Emphasis added.)

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[56] In *Thomas* v. *Collins*, 323 U.S. 516, 539, this Court stated that "the right either of workmen or of unions . . . to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others."

Recently, in *Bolling* v. *Sharpe*, 347 U.S. 497, this Court held that segregation of whites and Negroes in District of Columbia schools was an arbitrary and discriminatory classification which deprived Negro students of "liberty" in violation of the Fifth Amendment's due process clause. This decision was preceded by numerous declarations by the Court that, notwithstanding the absence of an equal protection clause in the Fifth Amendment, its guarantee of due process would forbid patently arbitrary or discriminatory legislation. *Nichols* v. *Coolidge*, 274 U.S. 531, 542; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585; *Currin* v. *Wallace*, 306 U.S. 1, 13-14; *Detroit Bank* v. *United States*, 317 U. S. 329, 338; *Hirabayashi* v. *United States*, 320 U. S. 81, 100; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184; *United States* v. *Kahriger*, 345 U.S. 22, 33-34; *Cf. Grosjean* v. *American Press Co.*, 297 U.S. 233, 250-251. In the *Bolling* case (*supra*, at p. 500), the Court stated: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools [because of the Fourteenth Amendment's equal protection clause], it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Cf. Herd* v. *Hodge*, 334 U.S. 24, 35-36. Thus, in effect, the due process clause now appears to bar discriminatory federal laws as completely as the equal protection clause of the Fourteenth Amendment prohibits discriminatory state legislation.

Although this Court has frequently ruled on the validity of discriminatory laws, the difficulties inherent in the problem have prevented formulation of precise distinctions between "arbitrary and discriminatory" legislative classifications, which are forbidden, and legislative classifications which merely fail to "cover the whole field", which are un-

objectionable.[57] It is clear, however, that legislation is discriminatory when it singles out one among a group composed of those "similarly situated" where

(1) The class singled out is injured or restricted in the enjoyment of rights and privileges, and

(2) There is no fair reason to exempt others similarly situated, or

(3) The legislative motive is to penalize those singled out for restriction.

Measured against these standards, Section 610 must fall as discriminatory legislation prohibited by the Fifth Amendment.

B. *Section 610 Falls As Discriminatory Legislation*

1. *The prohibition against labor union expenditures is especially injurious because opponents of labor who already enjoyed undue political power were thereby given further political advantage*

A discriminatory law must, of course, cause injury to those discriminated against before due process guarantees are violated. But injury occurs whenever individuals are restricted in the enjoyment of activities they might otherwise have pursued. As the Court stated in *Bolling* v. *Sharpe*, *supra*, at p. 499:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue . . ."

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[57] For an analysis of the cases and a suggested rationale of this difficult distinction see Tussman and tenBroek, *The Equal Protection of the Laws*, 37 California Law Review 341.

Since political elections are often adversary contests of strength, discriminatory laws which restrict political rights inflict unusually severe injury on the group subject to the discrimination. Thus, Congress has tremendously increased the political strength of those opposed to labor by selecting only labor unions for restrictive legislation, while associations of management and employers[58] and other groups traditionally opposed to labor in the political arena, are left completely unfettered. Yet studies show that labor election expenditures have been far smaller than those of business elements opposed to labor. Twenty million organized workers and their families, representing a major segment of the total population, have contributed less than 10% of all campaign funds. On the other hand, employer and employer-minded groups representing a tiny fraction of the population are the major source of funds for federal campaign expenditures.[59] Assets of wealthy families often support anti-labor candidates. Members of one family alone, the Duponts, regularly contribute about a hundred thousand dollars during election campaigns.[60]

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[58] When this favoritism was attacked at the time of the Senate debates on the predecessor to Section 610, the Smith-Connally Act, Senator Hatch stated on the Senate floor, with the agreement of Senator Connally, that it was necessary to: "bring into the same class as labor organizations the employer organizations such as the United States Chamber of Commerce and the National Association of Manufacturers. If one is to be denied the privilege of making political contributions, the other should be also." Senator Hatch promised to introduce a bill to carry out his statement (89 Cong. Rec. 5721). Pursuant to this promise, Senator Hatch introduced a bill to accomplish such restriction on employer groups on the very day the Senate passed the Smith-Connally Act over Presidential veto (89 Cong. Rec. 6503). The bill passed the Senate (90 Cong. Rec. 1643) but not the House.

[59] See Overacker, *Presidential Campaign Funds*, 13-16, and compare Table IV, p. 34 with Table V, p. 59.

[60] See, e.g., Senate Report No. 47, 79th Cong., 1st Sess.; Senate Report No. 101, Appendix VIII, 79th Cong. 1st Sess.; 9 Cong. Quarterly News Features, Weekly Reports, pp. 612-614 (April 1951). And see p. 62, *supra*.

Furthermore, employer-minded groups have influence often verging on control of the media of mass communication, a control used against labor in the opinion influencing processes.[61] Employer, business and management groups enjoy tremendous political advantage by the use of almost unlimited corporate funds expended as part of the cost of doing business. These millions used to saturate public opinion necessarily have tremendous impact on the selection and election of candidates. These funds, derived from widespread ownership of securities and sales of merchandise to the public, are used to promote business interests and propagandize against the interest of labor and labor unions. For instance, in 1950 the astounding fact was revealed by the General Motors Corporation that it had given to tax-exempt propaganda outfits and trade associations more than 4½ million dollars between 1947 and 1950.[62] This sum exceeds the *total* Democratic campaign expenditures in the 1950 elections as reported by 12 Democratic campaign committees and all Democratic Congressional candidates.[63] Corporations likewise sponsor advertising and radio and television commentators who help mould popular opinion.

The 4½ million dollars expended by General Motors must be multiplied hundreds of times to include similar contributions by thousands of other corporations. The result gives some indications of the staggering political advantage, as compared with labor unions, enjoyed by business

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[61] See, e.g., *A Free and Responsible Press, A Report of the Commission on Freedom of the Press* (1947); Stewart, *Radio Commentators and Free Speech*, 14 Common Sense 32 (Aug., 1945); Chase, *Sound and Fury*, 128-129 (1942); Hays, *Civil Discussion Over the Air*, 213 Annals 37, 44 (1941); *Freedom in the Opinion Industries* in Lerner, *Ideas Are Weapons* (1939); Lasswell, *Democracy Through Public Opinion* (1941).

[62] See House Report No. 3137, 81st Cong., 2d Sess., *"Expenditures by Corporations to Influence Legislation"*; Cong. Q. Almanac 763 (1950).

[63] 9 Cong. Q. News Features, pp. 421, 422 (1951).

elements who control expenditure of vast corporate funds.[64] It is this great disproportion that points up how important it is to labor to be able to use its limited union funds for the expression of labor's viewpoint directly in the elections "at the most crucial point where the expression would become effective" (See *United States* v. *CIO*, *supra*, at p. 150).

A recent description of the practices which permit business and management groups to use corporate power and

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[64] The use of the tremendous publicity power of anti-labor groups was given striking illustration by Senator Aiken during the debates on the Taft-Hartley Act. The Senator, a supporter of the Taft-Hartley Bill, stated on the floor of the Senate on May 12, 1947 (93 Cong. Rec. 5015-5017):

> "It is a wonder that Members of the Senate can hold their tempers and vote on the bill according to their best judgment, because we have been subjected to the most intensive, expensive, and vicious propaganda campaign that any Congress has ever been subject to. I do not refer to the propaganda campaign of the labor unions, although I hold no brief for that. I refer to a propaganda campaign which has cost well into the millions of dollars. I should not be surprised if the total amount spent in this campaign would amount to at least $100,000,000. I told the Senate last spring that the single March advertising campaign in the newspapers against labor by the National Association of Manufacturers cost $2,000,000, and that statement has not been contradicted as yet, although it was made a year ago. This propaganda campaign has been conducted through letters to the press; it has been conducted through radio commentators whose services have been for hire by various organizations. It has been conducted through speakers sent everywhere in the United States where they could get an opportunity to expound the antilabor doctrine. . . . This propaganda campaign has been carried on through corporations which have circularized their stockholders, asking them to write to Members of Congress favoring the House bill and opposing any mild bill. . . . If the conference committee undertakes to do to the bill what certain organizations, including the Chamber of Commerce of the United States, the National Association of Manufacturers, and the Committee for Constitutional Government, Inc., wish to have done to it, such a bill should not become law, and the President would be fully justified in vetoing it. . . ."

Actually, for 1947, the year of the passage of the Taft-Hartley law, the NAM reported expenditure of over four million dollars in what appear to be propaganda-connected activities. Cong. Q. Reports, 1948, p. 268. See Gable, *NAM—Influential Lobby or Kiss of Death?*, 15 Journal of Politics 254 (1953).

position for political purposes and against the interests of labor comes from a pamphlet published in September 1956 by the National Association of Manufacturers: "*Organized Labor's Program to Organize the Legislative Halls.*" At p. 14 thereof the following advice is given management:

> "Corporations, of course, cannot make political contributions. Besides the federal ban, corporations are barred from political donations—for any office—*in every one of the 48 states.*
>
> "But there are other ways in which management of industrial and business concerns can participate. Some are:
>
> Urging employees to register and vote.
>
> Discussing broad political issues in company publications.
>
> Permitting political candidates to tour plants and business establishments.
>
> Encouraging members of management staff to engage in practical politics.
>
> "Individuals have greater freedom and should exercise it, both in regard to contributions and activity in behalf of candidates who will be free agents."

A striking illustration which highlights the impact of Section 610 is found in the 1949-1950 pre-election activities of the American Medical Association. These activities were designed to defeat the Truman medical insurance program, a plan vigorously supported by labor.[65] The AMA campaign started early in 1949. To bolster its general funds the AMA imposed a special $25 assessment on every mem-

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[65] See Hyde & Wolff, *The American Medical Association: Power, Purpose and Politics in Organized Medicine*, 63 Yale Law Journal 938, 1012-1017, for a detailed history of the AMA campaign.

ber in order to get a "political war chest to fight socialized medicine" in the coming election.[66] By this means, more than 3½ million dollars was made available for pre-election use. The funds were used for an extensive propaganda campaign during the months preceding the November elections. Finally, during a two-week period just before the 1950 elections the AMA spent $1,100,000 for an anti-health-insurance message carried nationwide in 10,000 newspapers, 30 national magazines and over 1000 radio stations.[67] The fight was concentrated in areas where friends of health insurance legislation were running for election.[68] County and local medical societies made direct contributions to candidates[69] and widespread distribution was given to medical society endorsements of favored candidates. These activities were supplemented by those of supposedly independent healing arts groups. The doctors' organizations thus helped to defeat numerous labor-supported Congressmen who favored the health insurance program.[70] After the election the President of the AMA announced that in the light of the recent campaign "any compulsory health insurance bill in Congress today would go down to defeat by at least a 2 to 1 vote." 144 JAMA 1269 (1950). This was accomplished in substantial part by the use of general

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[66] New York Times, Dec. 2, 1948, p. 32 col. 2; id., Dec. 3, 1948, p. 20, col. 1. For expenditure of the fund see 9 Cong. Q. News Features, Weekly Reports, 565, 578-9 (April 1951).

[67] See New York Times, Nov. 26, 1950; "Are the People Listening?", address by Clem Whitaker, Director, National Education Campaign, American Medical Association, delivered before the second annual Southern Public Relations Conference, Tulane University, May 8, 1951; Nation's Business, September, 1950, p. 2; Hyde & Wolff, *op. cit. supra*, n. 65.

[68] See Lewis, *New Power at the Polls*, in January 1951 issue of "Medical Economics," p. 73.

[69] 9 Congressional Quarterly News Features, p. 424-425 (March 1951).

[70] See editorial in December 1950 issue of *"Medical Economics,"* p. 57; Lewis, *op. cit. supra*, n. 58.

funds and assessments of a professional association, membership in which is virtually indispensable to the successful practice of medicine.[71]

The AMA campaign of 1950 illustrates the effective use of large campaign funds immediately before an election for the defeat of labor-supported candidates when labor unions cannot enter the battle with union funds. And the use of general funds and membership assessments permitted AMA, but forbidden to labor unions, is a privilege likewise enjoyed by management associations who consistently oppose labor in political elections.

An additional example of discrimination might well be highlighted for the Court at this juncture. The district judge, on his own initiative, raised the question of the patent discrimination in favor of newspapers (R. 29). The Government readily conceded that newspapers, even where incorporated, were exempt from the prohibitions of Section 610 (R. 29). The district court referred to the fact that 90 or 95 percent of the newspapers seemed to be on one side (R. 29) and this, of course, is the opposite side from labor. In most areas the only newspapers in the community will be publicly campaigning against the candidate supported by labor and will be in a position not only to make themselves heard but also to prevent the voice of labor from being heard in their news columns. Every reason urged for application of the expenditures prohibition to labor unions applies with at least equal force to newspapers, which almost uniformly add their weight to the business side in opposition to the labor point of view. Appellee union is second to none in defending the right of a newspaper to campaign in favor of even the candidates labor most

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[71] A fully documented survey of legal and economic sanctions against doctors who are not members of AMA appears in *The American Medical Association: Power, Purpose and Politics in Organized Medicine*, by Hyde & Wolff, 63 Yale Law Journal 938, 948-953 (1954).

opposes. The statute, however, leaves labor unions defenseless to answer this campaigning.

Section 610 severely limits effective representation of labor interests in Congress by restricting only labor union election expenditures, and this discriminatory legislation has given further political power to anti-labor groups already unduly powerful far beyond their numbers. This is a most serious tangible injury to unions and their members which deprives them of liberty guaranteed by the Fifth Amendment.

2. *Justifications of the prohibition of election expenditures by unions are lacking in any sound policy basis not equally applicable to other associations of individuals*

Whether application of restrictive legislation to only one of a group or class amounts to arbitrary governmental action depends on whether the selection is "reasonably related to any proper governmental objective" (*Bolling* v. *Sharpe, supra*, at p. 500) or, as Mr. Justice Holmes stated in *Missouri* v. *May*, 194 U. S. 267, 269, the question is whether there is a "fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

There are two potential governmental objectives which have been tendered in support of Section 610. They are (a) the avoidance of the undue influence of unions and the maintenance of the purity of federal elections, and (b) the prevention of the involuntary use of union dues of members of one political party to support the candidate of an opposing party.

Undue influence could not be a valid ground for the legislation because, while union expenditures amounted to less than 10% of total campaign expenditures prior to 1947, expenditures by business groups regularly amount to the

largest share of total election contributions. The wealth of this latter element presented and continues to present a far more dangerous disproportionate influence on federal elections than the limited assets of labor unions representing twenty million voters. [72]

Thus if "undue influence" be the reason for the statute, there are those left untouched by it who exercise a much more undue or disproportionate influence than do labor unions. To the extent that some unions have sizeable funds available for political activity, this represents merely the size of their membership and it cannot be that political activity may be restricted to only small groups of individuals. Thus neither the actual nor potential influence of unions presents a fair reason for prohibiting their political expenditures any more than the mere size of the group would justify prohibiting political expenditures by any other group in the country. The same is true of the Government's present argument as to "purity of elections." Their theory applies with equal vigor to every other group in the country not organized purely for political purposes. If elections are to be kept "pure" by prohibiting multi-purpose organizations from engaging in politics, certainly this cannot be done by selecting only unions for such a "reform".

The Government also relies on the claim that because of certain compulsions to join labor unions, a prohibition on election expenditures by unions is necessary to prevent the dues of working men from being used against their wishes in support of candidates to whom they are opposed. This argument, however, is equally applicable to others whom the statute leaves untouched. There are, of course, economic and social motivations which impel union membership. A worker, though he may not agree that his dues are being used to support candidates most friendly to labor

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[72] See *supra*, pp. 61-63, 91-98.

and labor interests, may nevertheless, in view of such economic and social motivations, determine to remain in the union. But the same is true of many other associations of individuals whether they be those of farmers, doctors, lawyers, businessmen or the stockholders of a daily newspaper. [73] There are comparable economic and social motivations which impel men to join agricultural, professional or business associations, if not, indeed, political organizations. [74]

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[73] See, e.g., n. 71, p. 97, *supra*.

[74] It has at times been asserted that the discrimination against labor unions is offset by a like ban on corporate election expenditures. The argument assumes the validity of the prohibition on expression of corporation political views. But see opinion of Mr. Justice Rutledge in the *CIO* case at pp. 154-155. In any event, it is management and business associations, not corporations, which represent the counterpart to labor unions. Corporations are state-created entities deriving funds from widespread ownership and business activities. They are not associations of individuals formed to promote common group interests through social, educational, political and other means. The only common bond of the stockholders is their hope of profits; no remotely implied consent is given to the expenditure of these profits for election purposes. The majority rule in corporate decisions is the rule of the majority of stock voted, not the majority of individual holders. Nor does the buying public, which brings about these profits, have any common interest warranting political utilization of the profits they create. Unlike labor unions (see e.g., *Thomas* v. *Collins*, *supra*; *Thornhill* v. *Alabama*, 310 U.S. 88; *AFL* v. *Swing*, 312 U.S. 321), corporations do not enjoy constitutional liberties guaranteed to individuals and their associations. See e.g., *Bank of Augusta* v. *Earle*, 13 Pet. 519, 586 (U.S. 1839); *Blake* v. *McClung*, 172 U.S. 239, 259; *Hemphill* v. *Orloff*, 277 U.S. 537, 548; *Hague* v. *CIO*, 307 U.S. 496, 514; *Liberty Warehouse Co.* v. *Burley Tobacco*, 276 U.S. 71, 89; *Western Turf Association* v. *Greenberg*, 204 U.S. 359, 363.

Union members, unlike corporate stockholders, do have common social, economic and community interests requiring the common political action for which they have banded together. Thus, unions and corporations are not comparable entities with respect to the exercise of political activities. The bar against corporate expenditures cannot, therefore, offset the one-sided effect of a statute which leaves employer associations free while labor unions are restricted. Furthermore, as illustrated by the history of the AMA 1950 campaign, it is not enough that those *traditionally* opposed to labor be similarly restricted, for the exemption of the other myriad groups and associations may still result in tangible disadvantage to labor.

Furthermore, if social or economic pressures to join organizations are a sufficient basis for a federal bar on use of association funds for election expenditures, there are then no limits on potential curtailment of political rights, for the very association of individuals in groups bespeaks the presence of economic and social motivations. The importance of group political activity to the vigor of our electoral processes precludes recognition of social and economic pressures as a fair reason for prohibition of such activity.

It must, therefore, be concluded that no "fair reason" exists for the bar against labor organizations which would not compel similar prohibitions against other associations of individuals left unrestricted.

*3. Section 610 was enacted because of Congressional animosity toward labor unions*

Where legislative classification is challenged as discriminatory, this court will determine whether the legislature was motivated by improper bias or animosity.[75] The history of Section 610 illustrates that Congressional animosity toward unions and fear of labor's growing political strength, rather than any valid legislative purpose, were the bases of its enactment.[76] The American labor move-

[75] In *Yick Wo* v. *Hopkins*, 118 U.S. 356, 374, the Court struck down discriminatory state action stating: "the conclusion cannot be resisted, that no reason for [the discrimination] exists except hostility to the race and nationality to which the petitioners belong. . . ." In *Grosjean* v. *American Press Co., supra*, at p. 250, the Court struck down a tax where "in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information. . . ." See also *Truax* v. *Raich*, 239 U.S. 33, 40-41; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184; *cf. Guinn* v. *United States*, 238 U.S. 347.

[76] Significantly, the original prohibition contained in the Smith-Connally Act, 57 Stat. 168, 50 U.S.C. 1509 (1940 ed.), which barred union election contributions, was in a bill enacted on a wave of anti-union feeling

ment originated from the desire of workers to further their common objectives through economic and *political* action and there has been a tradition of American labor union political activity for over 100 years.[77] However, in the late 1930s, American labor unions began to be far more active in the political arena than previously. In the 1944 elections, labor was more effective and spent more money, especially through the CIO-PAC, than in any previous election. It was this growing activity of labor in promoting election of its candidates that provoked the enactment of Section 610.[78]

Significantly Section 610 was not enacted as part of a bill dealing with electoral reform or control of election expenditures but as a part of what may well be characterized as the most thorough-going and far-reaching anti-labor legislation in our national history. An examination of the legislative history of Section 610 illustrates that its enactment had no real considered basis other than hostility to labor unions. First, the committees which reported out the Taft-Hartley bill did not have a single witness before them who testified on the question of union political expenditures. Secondly, the committee reports which reported favorably on this unprecedented restriction on political activity did

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arising from activities of certain unions during the war, which were in no way related to union political expenditures. The prohibition was the product of that sentiment rather than the desire for electoral reform. See Tanenhous, *Organized Labor's Political Spending*, 16 Journal of Politics, 441; 443-5.

[77] See *The Labor Movement in the United States*, 1860-1895, by Norman J. Ware, Chap. 17; *Labor in America*, by Foster Rhea Dulles; David, *100 Years of Labor in Politics*, The House of Labor, 90; Daugherty & Parrish, *The Labor Problems of American Society*, 231, 239 (1952); Reynolds, *Labor Elections and Labor Relations*, 99-104 (1940); Chang, *Labor Political Action and the Taft-Hartley Act*, 33 Nebraska Law Review 554.

[78] See Overacker, *Presidential Campaign Funds*, Ch. III; Kallenbach, *The Taft-Hartley Act and Union Political Contributions and Expenditures*, 33 Minnesota Law Review 1.

not contain one single word in justification or explanation of the proposed ban. Thirdly, none of the Congressional debates in which this section of the bill was discussed indicated any actual abuses or corruption by labor unions with respect to their political expenditures.

A reading of the Congressional debates compels the conclusion that, rather than being a considered remedial measure intended to prevent some actual abuse, Section 610 was merely thrown in as an additional restriction on labor. There can be little question that it was added "for good measure" when labor was down in a losing struggle. Professor Tanenhous, whose work is cited repeatedly in the Government's Brief here, concluded therein (16 Journal of Politics 441 at 467):

> "Section 9 of the War Labor Disputes Act and section 304 of the Labor Management Relations Act were, this writer believes, motivated primarily by the desire to weaken materially labor's ability to influence public policy to its advantage. With rare exception, the most vocal sponsors of prohibitions on union spending were Congressmen with records conspicuous for hostility toward organized labor." [79]

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[79] In view of the great preponderance of union support for Democratic rather than Republican candidates, it is interesting to observe that this ban on union election expenditures was enacted by Republican support over Democratic opposition. The bill was sponsored by Republicans, drafted primarily by an attorney paid by the Republican National Committee (see pp. 1160-1201 of Hearings of a Subcommittee of the Committee on Education and Labor of the House of Representatives on H.R. 2032, 81st Cong., 1st Sess.), and enacted over a Democratic President's veto. In the Senate, the veto was overridden by 48 Republicans and 20 Democrats, opposed by 3 Republicans and 22 Democrats, and in the House by 225 Republicans and 106 Democrats, opposed by 11 Republicans and 71 Democrats. Senator Taft's remarks (93 Cong. Rec. 6437) during floor debate give further indication that Republican support for Section 610 was not uninfluenced by very practical considerations of political self-interest.

Mr. Justice Rutledge, writing for the four concurring Justices in *United States* v. *CIO*, *supra*, at p. 150, recognized the true legislative intent behind enactment of the prohibition on union election expenditures. He stated:

> "'minority protection' was not the only or perhaps the dominant object of its enactment. That object was rather to force unions as such entirely out of political life and activity, including for presently pertinent purposes the expressions of organized viewpoint concerning matters affecting their vital interests at the most crucial point where the expression would become effective."

Section 610 must fall as a "special, partial and arbitrary" exertion of legislative power directed against the effective political expression of the interests of millions of American labor union members.

## VI

### Section 610 Is Vague and Indefinite and Fails to Provide a Reasonably Ascertainable Standard of Guilt, in Violation of the Fifth and Sixth Amendments to the Constitution

It is elementary that a vague and indefinite criminal statute—i.e., one which fails to provide a reasonably ascertainable standard of guilt—violates the due process clause of the Fifth Amendment. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81; *Connally* v. *General Construction Co.*, 269 U.S. 385; *Herndon* v. *Lowry*, 301 U.S. 242. The double basis for the requirement of certainty in the application of a criminal statute is the individual's need for notice as to the standards of conduct which he must follow and the prosecutor's need for an adequate guide in enforcing the law. Neither basis, as we shall show, is satisfied by Section 610. Under its terms, "men of common intelli-

gence must necessarily guess at its meaning and differ as to its application." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453.

In simplest terms the question at this point of our argument is this: Would a reasonably intelligent trade union official know whether he was violating Section 610 when he authorized a particular disbursement related in one way or another to a Presidential or Congressional election? To us the answer seems clearly in the negative and we turn to a few examples to support this answer.

1. Take first the word "expenditure". This Court, to reach this point at all, must have decided that the term "expenditure" in the statute forbids the payment by a union to a television station to cover the cost of broadcasting to its members and the public the union's views on a particular election. This Court would not, of course, have overruled its decision that the publication of the union's views in the union newspaper is not a violation of the statute; rather the Court would have had to decide that there was a distinction between the publication of the union's views in its own newspaper and the publication of its views in a commercial newspaper or on a commercial television station.

Any such interpretative line between a union publication and a commercial means of communication would raise for the union official attempting to comply with the statute far more questions than it would settle. The line between publication in a union newspaper and publication through a commercial newspaper or television station may be semantically meaningful; for practical working purposes it is meaningless. For example, under such a line of distinction, can a union distribute its union publication beyond the union membership? Can it put extra copies in conspicuous public places for the public to pick up and carry home? Can it send a copy of its publication to every resident in the

particular district by house-to-house distribution? Can it write a covering letter to each resident in the district forwarding this publication? And what of those unions which do not own a newspaper? May they mail a mimeographed statement on the candidates to every member of the union? Then, too, may a union that has a daily radio program utilize this means of expressing its views on candidates? Would it be different if almost all the listeners were members of the union? A majority? Half? Less than half?

On the reverse side of the coin, does the interpretation of the statute to prohibit payments for a commercial television broadcast make illegal all payments to make the union's views known to its members and the public (other than the publication of a union newspaper)? May the union pay President Walter Reuther's plane fare to California to make a political speech and tell the members of the UAW there and the public the views of the union on the candidates? If not, may President Reuther even utilize the time of employees of the union to mimeograph and circulate a press release containing those views? Would these and similar expenditures of all kinds fall within the union publication rule of the *CIO* case or on the other side of the line, namely that union funds may not be used for general distribution of union views to both members and public?

These questions arise daily during the present campaign. Appellee union has endorsed the national Democratic slate. Were the expenses of making this fact known to the public a violation of Section 610? Are the costs for overhead, salaries and travel in spreading the reasons for this endorsement a violation of the statute? Or are all efforts to get the union views into the newspapers and on television valid up to the point of purchasing newspaper advertising or television time?

More and more unanswerable questions arise once a dis-

tinction is made between publication of the union's views through a union newspaper and publication through commercial channels. The UAW prepares pamphlets and leaflets on many subjects as a part of its regular union activity. May such a pamphlet or leaflet be prepared on a particular candidate, and if so, may funds be paid out for the distribution of such a pamphlet or leaflet to members of the union and/or to the public? Posters on various subjects are distributed to local unions for posting in union halls or neighborhood shops. May this be done for candidates? Meetings are often held in union halls on different subjects. May this be done for a particular candidate or are the expenses of such a meeting barred?

These are only the beginning of the questions that will arise if a line is drawn between a union newspaper and a commercial publication. We respectfully submit that once the principle suggested by appellee is rejected—namely, the principle that the term "expenditure" in the statute does not prevent a union from making its views on particular candidates known to its members and the public—there is no guide-post by which reasonable men can determine whether they are violating the law.[80] The term "ex-

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[80] The Government suggests no interpretation of the statute and provides no guideposts for conduct under the statute. Instead, it arbitrarily carves out of the all-inclusive language of Section 610 a number of random exceptions whose sole bond appears to be that they would present even greater constitutional difficulties than the case at bar. Probably the most far-reaching of these exceptions is that for labor union activities based upon voluntary contributions rather than dues (*Brief*, p. 40), an exception which is nowhere indicated in the language of the statute. Likewise the Government carves out of the statute an exception for newspaper expenditures (R. 27-28) which is equally absent from the language of the statute. Furthermore, even the exception for expenditures "in behalf of State candidates" (*Brief*, p. 50) cannot be found in the language of the statute which prevents a labor union from making an expenditure "in connection with any election at which Presidential and Vice-Presidential electors or a Senator or Representative . . . are to be voted for"; on its face Section 610 would seem to apply to state

penditure" becomes a vague catchall, meaning different things to different people. Once the principle we have suggested is rejected, the statute becomes vague and indefinite and lacking in any reasonably ascertainable standard of guilt.

2. Actually the word "expenditure" is not the sole ambiguity in Section 610 and may not even be the most ambiguous phrase. The statute is so loosely drawn that it is uncertain what other normal union activities in the legislative and political field are proscribed. Take the words "in connection with any election". The relation in time to an election, primary or convention, within which partisan speech or action may be held "in connection with" the event, is wholly uncertain. Would union expenditures in 1955 directed toward a long range educational program designed to shape the outcome of the 1956 elections be proscribed? Would the preparation and distribution by the union of Congressional voting records demonstrating that certain legislators had more often served the interests of the laboring man and the public than certain others constitute an expenditure "in connection with" an election? Appellee's voting records are probably as complete and thorough as are compiled by any organization. We believe they are extremely carefully and accurately done. Yet the union's views of right and wrong, of pro-labor and anti-labor, of pro-public interest and anti-public interest, shine through every line and word. We may assume that some readers would consider these voting records as campaign documents helpful to the Democratic Party in 1956, al-

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candidates selected at "any election at which" federal officers are elected. But the Government quite correctly recognizes the intent of Congress to except these categories in one way or another and this Court has added an additional excepted category in the *CIO* case. But no standard has been suggested by the Government or the courts to differentiate the categories excepted from the statute from those which the Government still asserts are within its prohibition.

though this was clearly not their sole or primary purpose. Is such a voting record prepared and distributed after the 1953 session of Congress a violation of the statute because it might affect the 1956 election? If not, is the voting record of the 1954 session a violation of the statute? Of the 1955 session? Of the 1956 session? Does the time factor determine the answer and, if not, what does determine it?

Labor's political activities are intertwined with its legislative and other governmental activities. Every criticism by a trade union of an administrative action of the government or a Congressional action or failure to act, has in it, expressly or impliedly, the suggestion of political action by the union and its members to support what the union believes right and oppose what it believes wrong. The intent to influence a forthcoming election in favor of persons whose views are generally favorable to labor and the public interest is always present in the publication of labor's views. In some instances the intent may be the primary one, in others a subsidiary one. Is the application of the statute to depend on whether the intent to influence an election one, two or five years off is primary or incidental? Obviously there can be no reasonably ascertainable standard of guilt under a statute that fails to provide answers to such fundamental questions.

3. A labor union operates in many ways—through collective bargaining, public education, legislation and elections. The full realization of the needs and aspirations of the trade union member and his family depends on educational, legislative and political activity no less than upon negotiations at the bargaining table. Activity in bargaining negotiations is interrelated with testimony before legislative bodies and political action to obtain friendly legislators. Pension plans which were won at the bargaining table supplement, and are supplemented by, social security

legislation achieved after decades of labor support; supplementary unemployment benefits, as the very name indicates, supplement unemployment compensation legislation; fringe benefits for health and welfare, including Blue Cross and Blue Shield, are directly related to labor's interest in federal health insurance; higher wages to be negotiated for workers in one plant may depend upon a legislative minimum wage preventing unfair wage competition at another plant. Thus labor's legislative and political activities are intertwined with its bargaining functions; the union official cannot keep these functions in pigeon-holes. Expenditures are often intended for several of these purposes at the same time; they are not and cannot be separated. To put the union leader at his peril in determining whether a particular "expenditure" is for one or the other of these complex purposes is to leave him without a reasonably ascertainable standard of guilt by which to guide his conduct.

## VII

### Conclusion

We believe we have shown to this Court that Section 610 impairs the rights of appellee and its members under the First Amendment at the very point where those rights are most zealously guarded by the Constitution and the courts in the interest of the fullest participation of all citizens in our democratic government and the continued vigor of the political processes upon which our free government depends. We believe, too, that we have shown that the statute unlawfully abridges the right of appellee and its members to choose Congressional representatives; that it constitutes an arbitrary discrimination against labor unions in violation of the due process clause of the Fifth Amendment; and that it fails to provide a reasonably as-

certainable standard of guilt in violation of the Fifth and Sixth Amendments. In short, we believe that the statute on its face and as applied to the appellee in this case is clearly unconstitutional.

Our burden, however, is not so great. It is not necessary for appellee to convince this Court of the unconstitutionality of the statute. It is necessary solely to convince the Court of the seriousness of the constitutional problems to be faced if the statute is not given the restrictive interpretation laid down by all the precedents to date. We believe that the review we have made of the constitutional issues demonstrates the wisdom of these precedents in restricting the statute in order to avoid passing upon these grave constitutional issues which lie at the very heart of our democratic society.

We respectfully urge that the judgment below be affirmed.

Respectfully submitted,

HAROLD A. CRANEFIELD,
*8000 East Jefferson Avenue,*
*Detroit 14, Michigan.*
JOSEPH L. RAUH, JR.,
*1631 K. St., N.W.,*
*Washington, D. C.,*
*Attorneys for Appellee.*

JOHN SILARD,
NORMA ZARKY,
KURT HANSLOWE,
REDMOND H. ROCHE, JR.,
*Of Counsel.*

SEPTEMBER, 1956.

# REPLY

# BRIEF

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## CITATIONS

*Cases:*

Cases—Continued



*Statute:*



*Miscellaneous:*

# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 44

UNITED STATES OF AMERICA, APPELLANT

*v.*

INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO)

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN*

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## REPLY BRIEF FOR THE UNITED STATES

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### I

**In Dismissing the Indictment for Failure to Charge an Offense, the District Court Did Not Narrow the Scope of the Indictment by Construction but Accepted It as Written.**

This Court, on April 23, 1956, noted probable jurisdiction of this appeal in relation to the following question specified in the Government's Statement as to Jurisdiction (p. 3-4):

> Whether offenses under 18 U.S.C. 610 are charged in an indictment, each count of which alleges that on a specified date the defendant labor union made an expenditure of a specified sum from

its general treasury fund, consisting of dues paid by members of the union, to defray the expenses of a particular political television broadcast sponsored by the defendant union over a commercial television station in which the defendant had no interest, which broadcast was intended to influence the electorate generally and urged and endorsed the election of certain candidates for United States Senator and Representative in Congress in the election held in Michigan in 1954.

Appellee contends that the Government's phrasing of the issue, which follows the language of the indictment, adopts a construction of the indictment at variance with that given by the district court. Appellee argues that the district court interpreted the indictment as charging only (Appellee's Br. 7, 18-19) "that appellee union paid for television programs 'to inform its members and others of the position of the Union on those seeking certain federal offices' ". This argument completely ignores the allegations of the indictment that the appellee "did knowingly and unlawfully make an expenditure from the general funds" of its treasury for television broadcasts in connection with specific elections, "urging and endorsing the selection of certain persons" as candidates, "which telecasts included expressions of political advocacy" intended "to influence the electorate generally" and "to affect the results of said primary election" (R. 2-6). On the premise that the indictment sought only to charge that appellee paid for television time "to inform its members and others of the position of the Union on those seeking certain federal offices" (Appellee's Br. 20), appellee argues that such payment does not constitute a political

"expenditure" within the meaning of 18 U.S.C. 610, and that "if such an expenditure is prohibited by 18 U.S.C. 610", the statute violates various provisions of the Federal Constitution (Appellee's Br. 2-3).

The opinion below cannot be read to emasculate the indictment in such manner and to assume an unalleged and unproved (though possible) set of facts. At the very outset of the opinion, the district court summarized all the allegations of the indictment (R. 36):

> Here the specific charge is that the "expenditure" violation came in connection with the selection of candidates for a senator and representative to the United States Congress during the 1954 primary and general elections. It is alleged that defendant paid a specific amount from its general treasury fund to Luckoff and Wayburn Productions, Detroit, Michigan, to defray the costs of certain television broadcasts sponsored by the Union from commercial television station WJBK.
>
> It is charged that the broadcasts urged and endorsed selection of certain persons to be candidates for representatives and senator to the Congress of the United States and included expressions of political advocacy intended by defendant to influence the electorate and to affect the results of the election.
>
> It is further charged that the fund used came from the Union's dues, was not obtained by voluntary political contributions or subscriptions from members of the Union, and was not paid for by advertising or sales.

The court then observed that for purposes of the motion to dismiss (R. 36) "the charges alleged are taken

as true", and that the "contention of [the appellee] is, first, that the expenditures, admittedly so made, are not the type of expenditures intended to be covered and prohibited by Section 610 of the Act." After reviewing the three cases involving statutory construction problems arising under Section 610 (*United States* v. *C.I.O.*, 335 U.S. 106; *United States* v. *Painters Local Union No. 481*, 172 F. 2d 854 (C.A. 2); *United States* v. *Construction & General Laborers Local Union No. 264*, 101 F. Supp. 869 (W.D. Mo.)), the court concluded (R. 44): "our decision is that under the authorities the 'expenditures' *charged in this indictment* are not expenditures prohibited by the Act" (emphasis added).[1] It is therefore apparent that the decision is based squarely on a finding that the whole indictment fails to charge a crime within the purview of 18 U.S.C. 610, and that the court did not attempt to construe, limit or reinterpret the indictment in any way.[2]

Appellee's contrary contention (Appellee's Br. 19) that "the district court's opinion construes the indictment as alleging expenditures for the purpose of a public expression of the union's political views" rests solely on the following excerpt from the district court's

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[1] The order dismissing the indictment states in pertinent part (R. 45-46):

"* * * it is concluded that said motion should be granted and the indictment dismissed upon the ground that the expenditures charged in the indictment are not expenditures prohibited by law and that the indictment therefore fails to state facts sufficient to constitute an offense against the United States. * * *"

[2] From a reading of the briefs filed by the Government in the district court and an examination of the court's hearing on the motion to dismiss, it is also clear that there is no basis for appellee's contention (Appellee's Br. 15-17) that the Government concurred below in the construction of the indictment which appellee now urges.

opinion under the title "Conclusions of Law" and the subtitle "Effect of These Three Decisions" (R. 43):

> According to the authorities the Union was not making an expenditure on behalf of a political candidate. It desired to inform its members and others of the position of the Union on those seeking certain federal offices. It was exercising the right to free speech. The question then might present itself as to whether or not what the Union did was in fact "make a contribution". This might be important if the Union were charged with "making a contribution". It is not. It was so charged in United States v. Construction & General Lab. L.U. No. 264, supra, on very similar facts, but still the court held that its acts did not encompass either a "contribution" or "expenditure".

It seems plain that this statement was not, in context, intended as a construction of the indictment, but was simply an observation that any political broadcast necessarily stated the position of the union and, therefore, reasonably involves "the right to free speech." The court was holding that, if the term "expenditure" were construed to include any acts involving "exercising the right of free speech" (R. 43), such "interpretation would bring into question the constitutionality of the section" under the authority of the three cases cited (R. 42).

In short, what the district court did was to look at the indictment and conclude that this must be a "speech" case. On the assumption that this Court's decision in *United States* v. *C.I.O., supra,* required it to avoid the application of the statute to any instance

where a union expenditure was intended to express the views of a union (no matter what else was also involved), and overlooking the limitation of that holding to the particular facts spelled out in that indictment (*i.e.*, expenditure for political advocacy in a "house organ" intended primarily for intraunion distribution),[3] the court construed the statute to exclude the facts alleged in the indictment as a matter of statutory construction. The decision, therefore, necessarily holds —as we point out in our main brief—that the statute does not cover *any* union broadcast involving speech, no matter what the amount expended, the kind of political advocacy involved, the intent of the unions in making the broadcast, or the role of the union's broadcasts in the candidate's campaign.[4] That is

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[3] Appellee cites testimony of Assistant Attorney General Warren Olney III given before a Senate Committee in May, 1955, recommending the amendment of Section 610 to make it a disclosure, rather than a prohibitory, statute as evidence that the Department of Justice had interpreted the Court's decision in *United States* v. *C.I.O.*, 335 U.S. 106, more broadly prior to this case (Appellee's Br. 42-45). Even if the point had any relevance here, it is not an accurate analysis of the testimony. Mr. Olney correctly noted that since five members of this Court had reserved decision as to the constitutional issues underlying the application of Section 610 to any union political expenditure, while four Justices would have held the statute unconstitutional on its face, its enforcement was rendered very difficult without a definitive pronouncement by this Court on the constitutional issues. However, the observation that there had been only three prosecutions under the section reflects the point, developed in our main brief, that under the statute as interpreted in the *C.I.O.* case there is a wide area where unions may and do operate without contravening the statute. This does not mean, and Mr. Olney did not imply, that if a union chose not to observe the limitations, and chose to use general rather than voluntarily-given funds for electioneering, such acts would not be within the statute.

[4] In essence, the district court made the same determination here, with respect to union broadcasts, that some courts and commentators have made with respect to the relationship between picketing

the precise ruling which is now before the Court for review.[5]

## II

### The Fact that There May Be Disputed Issues under the Indictment Does Not Render It Invalid.

Appellee argues (Br. 22-25) that the Government's statement in its brief—that the issue of whether the financing of a particular broadcast is in fact an "expenditure" under the statute must be determined on the basis of the proof to be developed at a trial—shows that the indictment is too vague and indefinite to state an offense. On this theory, any indictment is defective because all the details of the evidence on which the Government will rely in any case are invariably not spelled out in the indictment.

Here, the indictment charged the payment of substantial sums out of general union funds to a commercial television station, not owned by the union, to pay for television broadcasts urging, advocating, and endorsing the election of particular candidates with intent to influence the public generally and affect a particular election. It is the combination of these facts which, as

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and the right of free speech, *i.e.*, that picketing is always protected because it necessarily involves speech. This Court, on the other hand, has recognized that picketing can and does involve more than speech, and therefore can be appropriately regulated. *Giboney* v. *Empire Storage Co.*, 336 U.S. 490; *Hughes* v. *Superior Court*, 339 U.S. 460; *International Brotherhood of Teamsters Union* v. *Hanke*, 339 U.S. 470; *Building Service Employees International Union* v. *Gazzam*, 339 U.S. 532; *United States* v. *Petrillo*, 332 U.S. 1.

[5] Under the Criminal Appeals Act, this Court concerns itself with the construction of the statute adopted by the District Court and "the facts alleged in the indictment." *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 47; *United States* v. *Hoy*, 330 U.S. 724, 725; *United States* v. *Hood*, 343 U.S. 148; *United States* v. *C.I.O.*, 335 U.S. 106.

we indicate in the main brief, spells out the type of "expenditure"—amounting to or approaching an indirect contribution—which is prohibited by Section 610. An indictment which charges that combination of facts, as this one does, obviously does not, as appellee urges (Br. 25), require "proof of nothing more than the expression of union views"; it requires proof of political advocacy to the general public intended to influence the voting of the general public—*i.e.*, at the minimum, some degree of active electioneering on behalf of particular candidates.[6]

Of course, under such an indictment, issues involving the scope of Section 610 may very well arise at a trial. Conceivably, a defendant might undertake to show that its expressions of advocacy were not directed primarily to the general public, but to its own members. Conceivably, a defendant might undertake to argue that the broadcasts were merely statements of the union's views on economic matters, with a factual record of a candidate's previous votes on such matters. Conceivably, there could be close issues as to whether a particular broadcast was, under all the circumstances, active electioneering or no more than a simple statement of the union's position. The possible existence of such issues, however, does not make the indictment insufficient. Where a perjury indictment alleges that the false testimony was material, there can be close questions as to whether it was in fact material. Where a Sherman Act indictment alleges an unreasonable restraint of trade, there can be disputed issues as to whether the restraint was in fact unreason-

[6] The Court is not unfamiliar with the difference between advocacy and endorsement, on the one hand, and the mere expression of views, on the other. Cf. *Dennis* v. *United States*, 341 U.S. 494.

able. That does not mean that all the evidence to show materiality in perjury or unreasonable restraints of trade under the Sherman Act must be set out in the indictment in order to have the indictment state an offense. So here, the validity of the indictment is not affected by the fact that all the proof which the Government believes will show the kind of political advocacy which amounts to electioneering was not set forth in the indictment and that appellee may at the trial wish to argue that this evidence does not show such electioneering.

This indictment charges electioneering by the union to the general public out of general union funds. In our main brief, we offered, by way of illustration, the suggestion that the indictment would cover such electioneering activities as spot broadcasts. We did not deny that there might be broadcasts not constituting such out-and-out electioneering and therefore more open to dispute as to whether they are within the scope of the statute. This issue, as suggested in our main brief, must be determined on all the facts at the trial. That statement, however, does not imply, as appellee would have this Court believe, that the indictment as written covers "either legal or prohibited conduct". As we read the statute and its legislative history, Congress intended to bar the use of general union funds for any form of active general electioneering on behalf of particular candidates. The indictment charged that appellee did just what the statute prohibits. The issue as to whether the particular broadcasts were or were not that kind of electioneering is a matter of proof and not of the charge. Merely because the Government might fail to carry its burden at the trial of proving the allegations of the indictment, it does

not follow that the indictment covers "either legal or prohibited conduct". Judged by that standard, every indictment is defective; for there always exists the possibility in any case that the Government's evidence will be insufficient to convict. Only a trial can resolve that issue.

By moving to dismiss the indictment which, as noted, clearly charged electioneering to the general public on behalf of particular candidates, appellees sought a ruling that no speech by a union on behalf of particular candidates can ever come within the statute. It is appellee by its motion, and the district court by its ruling, which have posed the issue of whether any television broadcast by a union to the general public on behalf of particular candidates can ever be an "expenditure" under Section 610, regardless of the proof as to the degree of advocacy and the circumstances of the broadcast. The Government filed an indictment under which it was ready to spell out, from all the circumstances, the kind of active advocacy to the general public designed to influence an election which the indictment charges and which we believe the statute prohibits. It is the appellee which has succeeded in having the case come before this Court on the bare allegations of the indictment, and which now, after accomplishing that purpose, complains because the indictment is defended on the basis of its charge. Appellee is asking this Court to assume, without the evidence which its motion prevented the Government from offering, that the evidence would be different from or less than the indictment charges, and to decide constitutional issues on this assumed and unproved basis.

In this connection, it should be noted that appellee's motion to dismiss the indictment, which resulted in the

dismissal now appealed from, neither attacked the indictment for insufficiency of pleading, nor suggested any different reading of its language than appears on its face (R. 18-19), although appellee had applied for and been granted two extensions of time in which to file a motion for a bill of particulars or other motions going to the sufficiency of the indictment as a pleading (R. 7-9, 10-14, 15-16).[7] Appellee in fact admitted for purposes of the hearing the allegations of the indictment (R. 23), and conceded on inquiry from the court that "a very accurate summary" of its position was that (R. 21) "items like this, as alleged in the indictment—those are not the type of expenditures that Congress had in mind and that this court, in trying to give a constitutional—in trying to interpret the law constitutionally, couldn't make any other decision except that they are not that kind of expenditures". It is therefore clear that appellee specifically sought to have the statute construed against the indictment exactly as it was written, *i.e.*, to obtain (as it did) a ruling that no broadcast by a union paid for out of general funds in behalf of particular candidates designed to influence the general public can ever be an "expenditure" under Section 610.

## III

### Section 610, if Construed to Cover the Facts Alleged in this Indictment, Is Not Unconstitutional.

1. So much of appellee's discussion of the constitutionality of the statute is based on its construction of

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[7] The appellee entered its plea of not guilty to the charges of the indictment on July 29, 1955, at the arraignment (R. 15). On that date (R. 7-9, 14) and subsequently on September 26, 1955 (R. 16-18), the court granted extensions of time in which to file the motion for a bill of particulars to September 30, 1955, and then to October 31, 1955, respectively.

the indictment (which we have shown, *supra,* to be erroneous) that it has but little relevance to the question before this Court. Appellee's attempted restatement of the issue eliminates those elements of advocacy, purpose, and intent which are material allegations of this indictment and which characterize the acts complained of as "electioneering" rather than a mere statement of the union's position to the public. As we have demonstrated (Govt. Br. 48-51), Section 610 as sought to be applied under this indictment does not impose a prohibition on all union political activity, even of the kind designed to reach the public at large. The Act does not place any restraint on the political activities of the highly effective and complex political action groups organized on a nation-wide basis to represent labor at every level, so long as such activities are supported by voluntary contributions. Unions may, in many ways, some of which we have enumerated (Govt. Br. 48-51), disseminate their collective political views among their membership, and engage in many other kinds of public political activities financed through levied or union treasury funds. Unions have in fact admittedly been able to take an active and effective part in national political activity for the past ten years under the limited restraints of Section 610. There is therefore no warrant for appellee's repeated characterizations of Section 610 as a "prohibition of union political expression" (*e.g.,* Appellee's Br. 60), and its assertions, *e.g.,* that (Appellee's Br. 60) "In one stroke the primary organized representatives of 20 million laboring men and their families are denied the power of persuasion in the protection of their own interests and that of their members". Such statements overlook both the limited scope of Section 610 and the realities of political action in the

labor movement in America today, as described in our main brief.

This indictment charges what we believe the statute was, at the minimum, designed to prohibit:—union political activity which is financed with general union funds, which advocates, urges, and endorses particular candidates in specific elections, and which is intended to influence the outcome of that election. Section 610 as sought to be applied by this indictment cannot therefore be said, as appellee contends (Br. 70-72), to reach beyond the specific evils which Congress found to be inherent in the use of general union funds, contributed by all union members, for active support of a particular candidate. And, as discussed in our main brief, since this limited restraint is a reasonable one in relation to the problem, it is not prohibited under the First Amendment.

The contention that the statute violates the right of union members to choose representatives (Appellee's Br. 81-87) has been fully answered by our main brief. As there pointed out, the statute was precisely aimed at protecting the individual's right to political freedom of choice in supporting political representatives who must act in relation to many fields beyond the economic interest which impels a worker to join a union. It is the individual, and not the union, who has the right to vote. And it is within the power of Congress to determine that the individual, and not the union, should decide how he will spend his money to make that vote effective.

2. Appellee contends (Appellee's Br. 104-110) that the distinction suggested by the Government (Govt. Br. 18-19)—*viz.*, between permissible union expenditures for publication of political commentary in a regularly published union newspaper distributed primarily

among its membership, on the one hand, and prohibited expenditures for union-financed telecasts to the general electorate over commercial broadcasting facilities advocating, urging, and endorsing the election of particular candidates with the intent to influence the outcome of such specific elections, on the other—is so indefinite as to render Section 610 void for vagueness for failing to draw a line between permitted and prohibited conduct by unions. That however is the very distinction drawn by this Court's opinion in the *C.I.O.* case, as we have shown in our brief (Govt. Br. 18-19), and is clearly a valid one in the light of that opinion.

Whatever validity the argument of vagueness might have had originally (the argument was made in the *C.I.O. case,* see Govt. Br., *United States* v. *C.I.O.,* No. 695, O.T. 1947, at pp. 88-96) was lost when this Court construed the statute as not applying to the facts set forth in that indictment alleging expenditures for the intraunion distribution of regularly published union newspapers, while leaving it to operate against the general class of crimes to which it is addressed. This Court has recently stated that, where the general class of offenses to which a statute applies is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise, and that if this general class can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction. *United States* v. *Harriss,* 347 U.S. 612, 618.[8] The facts pleaded in this indictment state a case within the general class of offenses to which the

[8] For other cases also recognizing that undue vagueness in a statute can be cured by judicial interpretation, see *Winters* v. *New York,* 333 U.S. 507, 510; *Fox* v. *Washington,* 236 U.S. 273, 277; cf. *Dennis* v. *United States,* 341 U.S. 494, 502.

statute, however narrowly interpreted, must relate. And although appellee on its assumed state of facts denies that the statute applies to this case, it seems to concede that the statute is applicable to some form of active union electioneering (Appellee's Br. 40).

Section 610 is at least as definite in its coverage as many other criminal statutes which this Court has upheld against a charge of vagueness. See *United States* v. *Harriss,* 347 U.S. 612, and the cases cited therein at *id,* p. 624, fn. 15. It is undoubtedly more precise in its coverage than the legislation challenged in *United States* v. *Wurzbach,* 280 U.S. 396, where the Court on direct appeal sustained an act which made it unlawful for any Congressman, or candidate for Congress, or officer or employee of the United States "to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution *for any political purpose whatever,* from any such officer, employee, or person" (Emphasis added). The indictment in that case charged a Congressman with having received money from federal officers and employees for the political purpose of promoting his nomination as Republican condidate for representative at certain Republican primaries. The Court thought that the "language is perfectly intelligible and clearly embraces the acts charged." 280 U.S. at 398. It was argued that the statute was invalid, among other reasons, because there was no definite meaning to the crucial words "political purposes." However, this Court, in an opinion by Mr. Justice Holmes, said, at p. 399:

> * * * But we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on

> opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. Nash v. United States, 229 U.S. 373.

Cf. *Burroughs and Cannon* v. *United States*, 290 U.S. 534 (Federal Corrupt Practices Act), and *United Public Workers* v. *Mitchell*, 330 U.S. 75, 103-104 (Hatch Act: "active part in political management or political campaigns").

The term "expenditure," which appellee cites as particularly vague, carries with it not only the meaning given it by the *C.I.O.* decision but also the weighty gloss placed upon it in the legislative debates which we have reviewed in our brief (Govt. Br. 24-36). That legislative history clearly shows that Congress at the very least intended the term to apply to activities in the form of indirect contributions or subsidies to specific political campaigns represented by union-financed electioneering to the general public on behalf of a particular candidate for the purpose of influencing an election. There is thus in the offense an element of *scienter* which in itself does much to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 101-102. As this Court said in *United States* v. *Ragen*, 314 U.S. 513, 523-524, "On no construction can the statutory provisions here involved become a trap for those who act in good faith. A mind intent upon willful evasion is inconsistent with surprised innocence." Cf. *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340.

3. Appellee's contention that Section 610 is such an arbitrary discrimination against labor organizations that it violates due process is answered by the legislative history of the statute.[9]

In this field, Congress has acted to meet evils as it found them. It waited until a particular danger seemed to it to become pressing before taking action. Thus, the ban against contributions by corporations was imposed years before limitations were placed on labor organizations because only the use of the aggregate wealth of corporations to influence elections was found to be an evil in the early part of the century. Not until labor organizations became strong enough so that they were in a position to exert influence on elections which was believed to be disproportionate to the size of their membership, not until Congress had before it evidence of the use of that power, did Congress undertake to extend the prohibition against contributions to labor organizations. And not until Congress had before it substantial evidence that the prohibition against contributions was being avoided by contributions in the form of expenditures did it undertake to prohibit expenditures as well as contributions.

As to the contention (Appellee's Br. 98-101) that the rationale which supports the ban against corporations

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[9] It should be noted, as this Court has frequently stated, that the Fifth Amendment, unlike the Fourteenth, contains no equal protection clause, and any legislative classification which is not so arbitrary as to deny due process of law will therefore be upheld. See *LaBelle Iron Works* v. *United States*, 256 U.S. 377, 392; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584-585; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 400, 401; *Helvering* v. *Lerner Stores Co.*, 314 U.S. 463, 468; *Detroit Bank* v. *United States*, 317 U.S. 329, 337-338; *Hirabayashi* v. *United States*, 320 U.S. 81, 100.

and labor organizations would justify the extension of the act to other organizations as well, the answer was given by Senator Taft in the course of the debates on this provision (93 Cong. Rec. 6441):

> * * * if any abuses arise with respect to other organizations we can extend the provision of law to the other groups.

Certainly, labor organizations are different in character, scope, and purpose from other types of unincorporated associations, as the very existence of the Wagner Act and its subsequent modification in the Labor Management Relations Act shows. The legislative history of Section 610 shows, moreover, that Congress did not extend the act to cover unincorporated associations of employers, the type of unincorporated association most analogous to labor organizations in relation to the purpose of the statute here involved, because it felt that the existing ban against contributions and expenditures by corporations was sufficient to prevent the use of corporate funds for political purposes through the medium of unincorporated associations.[10]

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[10] See 93 Cong. Rec. 6439. Speaking of such business associations as the National Association of Manufacturers, Senator Taft said: "Such an association receiving corporation funds and using them in an election would violate the law, in my opinion, exactly as the PAC, if it got its fund from labor unions, would violate the law. If the labor people should desire to set up a political organization and obtain direct contributions for it, there would be nothing unlawful in that. If the National Association of Manufacturers, we will say, wanted to obtain individual contributions for a series of advertisements, and if it, itself, were not a corporation, then, just as in the case of PAC, it could take an active part in a political campaign. But the prohibition is against a labor organization or a corporation participating in an election either by a contribution to somebody else or by direct expenditure of its own funds. That has been understood to be the law of corporations for many years, and until labor

Nor is there any reason why Congress must necessarily deal with all unincorporated associations as a unit in enacting legislation such as Section 610. Even apart from fundamental differences between labor organizations and other unincorporated associations, this Court has

> * * * frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step", in dealing with the evils which are exhibited in activities within the range of legislative power. *Carroll* v. *Greenwich Insurance Co.*, 199 U.S. 401, 411; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Miller* v. *Wilson*, 236 U. S. 373, 384; *Sproles* v. *Binford*, 286 U. S. 374, 396. * * *.

*National Labor Relation Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46. See also *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 471-472, where the Court said:

> The contention that the Act denies equal protection because its provisions, or some of them, have not been extended to business corporations or associations or to labor organizations which are subject to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*,

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organizations were placed under the terms of the Smith-Connally Act, no one supposed that corporations could make direct expenditures without it being considered a contribution. But after the labor organizations were included, that question was raised. In order that it might be finally resolved in this bill, we made it perfectly clear that it covers either a contribution to somebody else or an expenditure of one's own funds for the same purpose, in connection with an election."

is without substance. The Constitution does not oblige a state to regulate or reform all types of associations and organizations, or none. It may begin with such as in its judgment most need regulation. *Carroll* v. *Greenwich Insurance Co.*, 199 U.S. 401, 411; *Keokee Coke Co.* v. *Taylor*, 234 U.S. 224, 227; *Bunting* v. *Oregon*, 243 U.S. 426; *Sproles* v. *Binford*, 286 U.S. 374, 396; cf. *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 400, and cases cited.

And, as this Court said in *United States* v. *Petrillo*, 332 U. S. 1, 8-9:

> * * * it is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. * * * Nor could we strike down such legislation, even if we believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area.

Respectfully submitted,

J. LEE RANKIN,
*Solicitor General.*
WARREN OLNEY III,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
CARL H. IMLAY,
*Attorneys.*

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